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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 642.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

WILLIAM R. MASON AND JOSEPH VANDERWEIDE.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED DECEMBER 11, 1908.

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1 Pleas in the District Court of the United States for the District of Colorado sitting at Denver.

Be it remembered, that heretofore, and on, to wit, the ninth day of January, A. D. 1908, the same being one of the regular juridical days of the November term, A. D. 1907, of said court; Present, the Honorable Robert E. Lewis, district judge, the following proceeding was had and entered of record in said court, to wit:

*In the matter of the grand jury.*

At this day come the members of the grand jury, heretofore duly empaneled and sworn as grand jurors, and return into court now here the following true bills of indictment, to wit:

* * * * * * *

THE UNITED STATES OF AMERICA
*vs.*
WILLIAM R. MASON AND JOSEPH VANDERWEIDE. } 2075. Indictment for conspiracy.

(Endorsed:) A true bill.
(Signed) WILLIAM F. GEDDIS, *Foreman.*

And it now appearing to the court that the defendants
2 herein are now in the custody of the District Court of the Sixth Judicial District, sitting within and for the county of La Plata, State of Colorado, upon the charge of having murdered one Joseph A. Walker, being the same person described in the indictment herein.

It is ordered by the court that no bench warrant, capias, or other process for the arrest of the defendants issue herein until the further order of the court.

And the said indictment is in words and figures as follows, to wit:

UNITED STATES OF AMERICA,
*District of Columbia, ss:*

In the District Court of the United States, within and for the district of Colorado, within the eighth judicial circuit, in the term beginning on the first Tuesday in November, in the year of our Lord, one thousand nine hundred and seven.

The grand jurors of the United States of America, duly impanelled, sworn, and charged by said court to inquire within and for the said district of Colorado, upon their oaths do present that William R. Mason and Joseph Vanderweide, late of the district of Colorado, heretofore, to wit, on the second day of November, in the year of our Lord one thousand nine hundred and seven, in the
3 county of La Plata, in the district of Colorado, and within the jurisdiction of this court, did then and there unlawfully, willfully, knowingly, maliciously, and feloniously conspire, combine, confederate, and agree together, and with James Struthers and John

Cunningham and divers other persons to the grand jurors unknown, to injure, oppress, threaten, and intimidate Joseph A. Walker, John E. Chapson, Thomas J. Callaghan, and Thomas Harper, then and there citizens respectively of the United States, in the free exercise and enjoyment of a right and privilege secured to them, and each of them, by the Constitution and laws of the United States, in this, to wit, the said Joseph A. Walker, John E. Chapson, Thomas J. Callaghan, and Thomas Harper were then and there special agents and employes respectively of the Department of Justice of the United States, and citizens, officers, and agents of the said United States, and it was then and there a right and privilege, and the free exercise thereof secured to them, and each of them, as citizens of the United States by the Constitution and laws of the United States, to investigate, discover, inform of, and report all violations of the laws of the United States and evidence thereof concerning and in the matter of the fraudulent and unlawful entry of public coal lands and other public lands of the United States within the said district of Colorado, theretofore subject to entry under the laws of the United States at the proper land offices of the United States in said district
4 of Colorado, to Marsden C. Burch, special assistant to the Attorney-General of the United States, and Earl M. Cranston, United States attorney for the district of Colorado; a part of which said public coal lands of the United States, theretofore unlawfully entered, are more particularly described as follows, to wit: The northeast quarter and the southeast quarter section twenty-eight; the west half of the northeast quarter and the east half of the northwest quarter section twenty-one; the southwest quarter section twenty-one; the east half of the northeast quarter section twenty; the west half of the northwest quarter section twenty-one; the east half of the northwest quarter, the northwest quarter of the northwest quarter section twenty-eight; the southeast quarter section twenty-one; the west half of the northeast quarter and the east half of the northwest quarter section twenty-five; the west half of the southeast quarter section twenty-five; the southeast quarter of the southeast quarter section twenty-four; the west half of the northwest quarter, the west half of the southwest quarter section twenty-five; the east half of the southeast quarter section twenty-five; the south half of the southwest quarter section twenty-two; the north half of the northwest quarter section twenty-two; the east half of the northeast quarter section twenty-two; all in township thirty-five north range eleven
5 west, New Mexico principal meridian, situate in the said county of La Plata, in the Durango land district, in said State and district of Colorado, and public coal lands of the United States theretofore subject to entry under the laws of the United States, at the United States land office at Durango aforesaid; and the said Marsden C. Burch and the said Earl M. Cranston were then and there such officers of the United States, duly authorized and in duty bound to receive said information, facts, and reports from the said

Joseph A. Walker, John E. Chapson, Thomas J. Callaghan, and Thomas Harper, of violations of said laws, and thereupon to institute criminal prosecutions against persons guilty of the violation of said laws, and civil suits on behalf of the United States to recover the possession and title to said lands. That at all the times mentioned in this indictment the said Joseph A. Walker, John E. Chapson, Thomas J. Callaghan, and Thomas Harper were then and there citizens of the United States and engaged as aforesaid in the exercise of their said right and privilege secured to them by the Constitution and laws of the United States; that in pursuance of said unlawful and felonious conspiracy, combination, confederation, and agreement aforesaid, and to effect the object thereof, the said William R. Mason and Joseph Vanderweide thereafter, on the third day of No-
6 vember, in the year of our Lord one thousand nine hundred and seven, in the said county of La Plata, within said district of Colorado, and within the jurisdiction of this court, with force and arms at the district aforesaid, in and upon the said Joseph A. Walker, then and there being, unlawfully, willfully, purposely, feloniously, and of their deliberate and premeditated malice did then and there make an assault with intent him, the said Joseph A. Walker, unlawfully, purposely, feloniously, and of their deliberate and premeditated malice to kill and murder, and that the said Joseph Vanderweide had then and there a certain double-barreled shotgun, each barrel of which was then and there charged with gunpow'er and twelve leaden bullets, otherwise called buckshot, which said shotgun the said Joseph Vanderweide in his hands then and there had and held, and then and there unlawfully, purposely, and of his deliberate and premeditated malice did discharge and shoot off, to, at, against, and upon the said Joseph A. Walker, and did then and there unlawfully, feloniously, purposely, and of his deliberate and premeditated malice strike, penetrate, and wound the said Joseph A. Walker in and upon the left side of the neck and upon the back and left shoulder, two of said bullets aforesaid passing through the neck and coming out on the right-hand side thereof, and three of said bullets
7 penetrating the back and left shoulder of him, the said Joseph A. Walker, passing inward and to the right and slightly downward through the lungs of him, the said Joseph A. Walker, and the said Joseph Vanderweide, with the leaden bullets aforesaid, by means of the shooting off and discharging said shotgun so loaded, to, at, upon, and against the said Joseph A. Walker, and by such striking, penetrating and wounding the said Joseph A. Walker inflicated as aforesaid two mortal wounds upon the neck as aforesaid and three mortal wounds upon the back and left shoulder as aforesaid, of which said mortal wounds he, the said Joseph A. Walker, did then and there languish and languishing did then and there instantly die within a year and a day from the inflicting of said mortal wounds as aforesaid; and that the said William R. Mason then and there unlawfully, feloniously, purposely, and of his deliberate and premeditated malice was present aiding, abetting, comforting, procuring, assisting, and

maintaining the said Joseph Vanderweide in the felony and murder aforesaid, in manner and form to do and commit; and so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said William R. Mason and Joseph Vanderweide him, the said Joseph A. Walker, in the manner aforesaid, unlawfully, purposely, and of deliberate and premeditated malice did kill and murder, while exercising his said right and privilege under the Constitution
8 and laws of the United States; and the said William R. Mason and Joseph Vanderweide further, in pursuance of said unlawful and felonious conspiracy, combination, confederation, and agreement aforesaid and to effect the object thereof, in said county of La Plata, in the said district of Colorado, and within the jurisdiction of this court, on said third day of November, in the year of our Lord one thousand nine hundred and seven, did then and there unlawfully and feloniously injure, oppress, threaten, intimidate, and imprison the said John E. Chapson, Thomas J. Callaghan, and Thomas Harper in the Hesperus coal mine, situated in said county and district and owned and operated by The Porter Fuel Company, a corporation, into which said Hesperus coal mine the said John E. Chapson, Thomas J. Callaghan, and Thomas Harper had descended by means of a rope and pulley down the air shaft of said Hesperus coal mine to a depth of sixty feet, for the purpose of ascertaining the depth, thickness, and dip of coal veins and other geological formations in that vicinity, and were so imprisoned by the said William R. Mason and Joseph Vanderweide at said depth of sixty feet under the ground by them, the said William R. Mason and Joseph Vanderweide untying said rope and dropping the same to the bottom of said air shaft, thereby intending to prevent the said John E. Chapson, Thomas J. Callaghan, and Thomas Harper from
9 coming out of said mine through said air shaft; and by further closing up the only tunnel leading into said Hesperus coal mine; and by further then and there stationing certain persons, to wit, James Struthers and divers other persons to the grand jurors unknown, armed with loaded shotguns and revolvers, at the mouth of said tunnel; and further by stationing certain persons, to wit, John Cunningham and divers other persons to the grand jurors unknown, armed with loaded shotguns and revolvers, at or near said air shaft, to assault, intimidate, and prevent the said John E. Chapson, Thomas J. Callaghan, and Thomas Harper from coming out of said mine, and thereby did then and there unlawfully and feloniously injure, oppress, threaten, and intimidate the said John E. Chapson, Thomas J. Callaghan, and Thomas Harper, as citizens of the United States in the exercise and enjoyment of the aforesaid right and privilege secured to them and each of them by the Constitution and laws of the United States, contrary to the form, force, and effect of the statute of the United States of America in such case made and provided and against the peace and dignity of the said United States.

EARL M. CRANSTON,
*United States Attorney for the District of Colorado.*

10

SECOND COUNT.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that William R. Mason and Joseph Vanderweide, late of the district of Colorado heretofore, to wit, on the second day of November, in the year of our Lord one thousand nine hundred and seven, in the county of La Plata, in the district of Colorado, and within the jurisdiction of this court, did then and there unlawfully, willfully, knowingly, maliciously, and feloniously conspire, combine, confederate, and agree together, and with James Struthers and John Cunningham, and divers other persons to the grand jurors unknown, to injure, oppress, threaten, and intimidate Joseph A. Walker, John E. Chapson, Thomas J. Callaghan, and Thomas Harper, then and there citizens, respectively, of the United States, because of their having freely exercised a right and privilege secured to them, and each of them, by the Constitution and laws of the United States, in this, to wit, the said Joseph A. Walker, John E. Chapson, Thomas J. Callaghan, and Thomas Harper were then and there, and at all times mentioned in this indictment, special agents and employees, respectively, of the Department of Justice of the United States, and citizens, officers, and agents of the said United States, and it was then and there their right and privilege and the free exercise

11 thereof, secured to them, and each of them, as citizens of the United , by the Constitution and laws of the United States, to investigate, discover, inform of, and report all violations of the laws of the United States, and evidence thereof, concerning, and in the matter of the fraudulent and unlawful entry of public coal lands, and other public lands of the United States, within the said district of Colorado, theretofore subject to entry under the laws of the United States at the proper land offives of the United States in said district of Colorado, to Marsden C. Burch, special assistant to the Attorney-General of the United States, and Earl M. Cranston, United States attorney for the district of Colorado; a part of which said public coal lands of the said United States, theretofore unlawfully entered, are more particularly described as follows, to wit: The northeast quarter and the southeast quarter section twenty-eight; the west half of the northeast quarter and the east half of the northwest quarter section twenty-one; the southwest quarter section twenty-one; the east half of the northeast quarter section twenty; the west half of the northwest quarter section twenty-one; the east half of the northwest quarter, the northwest quarter of the northwest quarter section twenty-eight; the southeast quarter section twenty-one; the west half of the northeast quarter, the east half of the northwest quar-

12 ter section twenty-five, the west half of the southeast quarter section twenty-five, the southeast quarter of the southeast quarter section twenty-four; the west half of the northwest quarter, the west half of the southwest quarter section twenty-five; he east half of the southeast quarter section twenty-five; the south half of the southwest quarter section twenty-two; the north half of the northwest quar-

ter section twenty-two, and the east half of the northeast quarter section twenty-two, all in township thirty-five north, range eleven west, New Mexico principal meridian, situate in the said county of La Plata, in the Durango land district, in said State and district of Colorado, and public coal lands of the United States theretofore subject to entry under the laws of the United States at the United States land office at Durango aforesaid; and the said Joseph A. Walker, John E. Chapson, Thomas J. Callaghan, and Thomas Harper, and each of them, had then and there and prior thereto continuously during the months of April, May, June, October, and November, in the year nineteen hundred and seven, freely exercised said right and privilege secured to them and each of them, as citizens of the United States by the Constitution and laws of the United States, in this, to wit, they had investigated, discovered, informed of and reported violations of the laws of the United States, and evidence
13 thereof, concerning and in the matter of the fraudulent entry of the lands hereinbefore described, to the said Marsden C. Burch and Earl M. Cranston, as aforesaid; and the said Marsden C. Burch and the said Earl M. Cranston were then and there such officers of the United States duly authorized and in duty bound to receive said information, facts, and reports from the said Joseph A. Walker, John E. Chapson, Thomas J. Callaghan, and Thomas Harper, of violations of said laws, and thereupon to institute criminal prosecutions against persons guilty of the violations of said laws, and civil suits on behalf of the United States to recover the possession and title to said lands. That at all the times mentioned in this indictment the said Joseph A. Walker, John E. Chapson, Thomas J. Callaghan, and Thomas Harper were then and there citizens of the United States and engaged as aforesaid in the exercise of their said right and privilege secured to them by the Constitution and laws of the United States; that in pursuance of said unlawful and felonious conspiracy, combination, confederation, and agreement aforesaid, and to effect the object thereof, the said William R. Mason and Joseph Vanderweide thereafter, on the third day of November, in the year nineteen hundred and seven, in the said county of La Plata and within the district of Colorado, and within the jurisdiction of
14 this court, did then and there unlawfully, willfully, feloniously, premeditatively, deliberately, and with malice aforethought, kill and murder the said Joseph A. Walker, by shooting him, the said Joseph A. Walker, in the neck and back with a shotgun, loaded with powder and buckshot, with the intent of them, the said William R. Mason and Joseph Vanderweide, and each of them, to kill and murder him, the said Joseph A. Walker, as more particularly charged and set forth in the first count of this indictment, because of having exercised, as aforesaid, his said right and privilege under the Constitution and laws of the United States; and the said William R. Mason and Joseph Vanderweide further, in pursuance of said unlawful and felonious conspiracy, combination, confederation, and agreement aforesaid, and to effect the object thereof, in said

county of La Plata, in the said district of Colorado and within the jurisdiction of this court, on said third day of November, in the year nineteen hundred and seven, did then and there unlawfully and feloniously injure, oppress, threaten, intimidate, and imprison the said John E. Chapson, Thomas J. Callaghan, and Thomas Harper in the Hesperus coal mine, situated in said county and district and owned and operated by the Porter Fuel Company, a corporation, into which said Hesperus coal mine the said John E. Chapson, Thomas J. Callaghan, and Thomas Harper had descended by means
15 of a rope and pulley down the air shaft of said Hesperus coal mine to a depth of sixty feet, for the purpose of ascertaining the depth, thickness, and dip of coal veins and other geological formations in that vicinity, and were so imprisoned by the said William R. Mason and Joseph Vanderweide at said depth of sixty feet under the ground by them, the said William R. Mason and Joseph Vanderweide untying said rope and dropping the same to the bottom of said air shaft, thereby intending to prevent the said John E. Chapson, Thomas J. Callaghan, and Thomas Harper from coming out of said mine through said air shaft; and by further closing up the only tunnel leading into said Hesperus coal mine, and by further then and there stationing certain persons, to wit, James Struthers and divers other persons to the grand jurors unknown, armed with loaded shotguns and revolvers, at the mouth of said tunnel, and further by stationing certain persons, to wit, John Cunningham and divers other persons to the grand jurors unknown, armed with loaded shotguns and revolvers, at or near the said air shaft, to assault, intimidate, and prevent the said John E. Chapson, Thomas J. Callaghan, and Thomas Harper from coming out of said mine, and thereby did then and there unlawfully and feloniously injure, oppress, threaten, and intimidate the said John E. Chapson, Thomas J. Callaghan, and
16 Thomas Harper, as citizens of the United States, because of their having exercised the aforesaid right and privilege secured to them, and each of them, by the Constitution and laws of the United States; contrary to the form, force, and effect of the statute of the United States of America in such case made and provided and against the peace and dignity of the said United States.

EARL M. CRANSTON,
*United States Attorney for the District of Colorado.*

THIRD COUNT.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say that William R. Mason and Joseph Vanderweide, late of the district of Colorado, heretofore, to wit, on the second day of November, in the year of our Lord one thousand nine hundred and seven, in the county of La Plata, in the district of Colorado, and within the jurisdiction of this court, did then and there unlawfully, willfully, knowingly, maliciously, and feloniously conspire, combine, confederate, and agree together, and with James

Struthers and John Cunningham and divers other persons to the grand jurors unknown, to injure, oppress, threaten, and intimidate Joseph A. Walker, John E. Chapson, Thomas J. Callaghan, and Thomas Harper, then and there citizens respectively of the
17 United States, in the free exercise and enjoyment of a right and privilege secured to them, and each of them, by the Constitution and laws of the United States, in this, to wit, the said Joseph A. Walker, John E. Chapson, Thomas Callaghan, and Thomas Harper were then and there special agents and employes, respectively, of the Department of Justice of the United States, and citizens, officers, and agents of the said United States, and it was then and there their right and duty by virtue of their employment, and they were duly authorized, to investigate, discover, inform of, and report all violations of the laws of the United States, and evidence thereof, concerning and in the matter of the fraudulent and unlawful entry of public coal lands, and other public lands of the United States, within the said district of Colorado, theretofore subject to entry under the laws of the United States at the proper land offices of the United States in said district of Colorado, to Marsden C. Burch, special assistant to the Attorney-General of the United States, and Earl M. Cranston, United States attorney for the district of Colorado, a part of which said public coal lands of the United States theretofore unlawfully entered, are more particularly described as follows, to wit: The northeast quarter and the southeast quarter section twenty-eight; the west half of the northeast quarter and the east half of the northwest
18 quarter section twenty-one; the southwest quarter section twenty-one; the east half of the northeast quarter section twenty; the west half of the northwest quarter section twenty-one; the east half of the northwest quarter, the northwest quarter of the northwest quarter section twenty-eight; the southeast quarter section twenty-one; the west half of the northeast quarter and the east half of the northwest quarter section twenty-five; the west half of the southeast quarter section twenty-five; the southeast quarter of the southeast quarter section twenty-four; the west half of the northwest quarter and the west half of the southwest quarter section twenty-five; the east half of the southeast quarter section twenty-five; the south half of the southwest quarter section twenty-two; the north half of the northwest quarter section twenty-two, and the east half of the northeast quarter section twenty-two, all in township thirty-five north, range eleven west, New Mexico principal meridian; situate in the said county of La Plata, in the Durango land district, in said State and district of Colorado, and public coal lands of the United States theretofore subject to entry under the laws of the United States at the United States land office at Durango aforesaid; and the said Marsden C. Burch and the said Earl M. Cranston were then and there such officers of the United States, duly authorized and in duty
19 bound to receive said information, facts, and reports from the said Joseph A. Walker, John E. Chapson, Thomas J. Callaghan, and Thomas Harper, of violations of said laws, and thereupon

to institute criminal prosecutions against persons guilty of the violation of said laws, and civil suits on behalf of the United States to recover the possession and title to said lands; and it was then and there a right and privilege secured to the said Joseph A. Walker, John E. Chapson, Thomas J. Callaghan, and Thomas Harper, and each of them, as citizens of the United States, by the Constitution and laws of the United States, to accept such public employment and enter the service of the United States as such officers, agents, and employes, and to engage in the administration of the functions of said public offices and employment, and while so exercising such functions to be secure in their persons from bodily harm, injury, assault, and cruelties. That at all the times mentioned in this indictment the said Joseph A. Walker, John E. Chapson, Thomas J. Callaghan, and Thomas Harper were then and there citizens of the United States and engaged as aforesaid in the exercise of their said right and privilege secured to them by the Constitution and laws of the United States; that in pursuance of said unlawful and felonious conspiracy, combination, confederation, and agreement aforesaid, and to effect
20 the object thereof, the said William R. Mason and Joseph Vanderweide thereafter, on the third day of November, in the year nineteen hundred and seven, in the said county of La Plata, within said district of Colorado, and within the jurisdiction of this court, did then and there unlawfully, willfully, feloniously, premeditatively, deliberately, and with malice aforethought, kill and murder the said Joseph A. Walker by shooting him, the said Joseph A. Walker, in the neck and back with a shotgun loaded with powder and buckshot, with the intent of them, the said William R. Mason and Joseph Vanderweide, and each of them, to kill and murder him, the said Joseph A. Walker, as more particularly charged and set forth in the first count of this indictment, while exercising, as aforesaid, his said right and privilege under the Constitution and laws of the United States; and the said William R. Mason and Joseph Vanderweide further, in pursuance of said unlawful and felonious conspiracy, combination, confederation, and agreement aforesaid, and to effect the object thereof, in said county of La Plata, in the said district of Colorado, and within the jurisdiction of this court, on said third day of November, in the year of our Lord nineteen hundred and seven, did then and there unlawfully, and feloniously injure, oppress, threaten, intimidate, and imprison the said John E. Chapson, Thomas J. Callaghan,
21 and Thomas Harper in the Hesperus coal mine, situated in said county and district and owned and operated by The Porter Fuel Company, a corporation, into which said Hesperus coal mine the said John E. Chapson, Thomas J. Callaghan, and Thomas Harper had descended by means of a rope and pulley down the air shaft of said Hesperus coal mine to a depth of sixty feet for the purpose of ascertaining the depth, thickness, and dip of the coal veins and other geological formations in that vicinity, and were so imprisoned by the said William R. Mason and Joseph Vanderweide at said depth of sixty feet under the ground by them, the said William R. Mason and

Joseph Vanderweide untying said rope and dropping the same to the bottom of said air shaft, thereby intending to prevent the said John E. Chapson, Thomas J. Callaghan, and Thomas Harper from coming out of said mine through said air shaft; and by further closing up the only tunnel leading into said Hesperus coal mine, and by further then and there stationing certain persons, to wit, James Struthers and divers other persons to the grand jurors unknown, armed with loaded shotguns and revolvers, at the mouth of said tunnel, and further by stationing certain persons, to wit, John Cunningham and divers other persons to the grand jurors unknown, armed with loaded shotguns and revolvers, at or near said air shaft to assault, intimidate,
and prevent the said John E. Chapson, Thomas J. Callaghan,
22 and Thomas Harper from coming out of said mine, and thereby
did then and there unlawfully and feloniously injure, oppress, threaten, and intimidate the said John E. Chapson, Thomas J. Callaghan, and Thomas Harper, as citizens of the United States, in the exercise and enjoyment of the aforesaid right and privilege secured them and each of them by the Constitution and laws of the United States, contrary to the form, force, and effect of the statute of the United States of America in such case made and provided, and against the peace and dignity of the said United States.

EARL M. CRANSTON,
*United States Attorney for the District of Colorado.*

(Endorsed:) No. 2075. United States District Court for the District of Colorado. The United States of America vs. William R. Mason, Joseph Vanderweide. Indictment: Conspiracy in violation of sections 5508 and 5509 R. S. U. S. A true bill: William F. Geddis, foreman. Filed Jany. 9, 1908. Charles W. Bishop, clerk. Earl M. Cranston, U. S. attorney.

Ninety-fifth day, November term. Saturday, April 18th, A. D. 1908.

Present: The Honorable Robert E. Lewis, district judge,
23 and other officers as noted on the twenty-fifth day of February, A. D. 1908.

THE UNITED STATES OF AMERICA.
*vs.*
WILLIAM R. MASON AND JOSEPH VANDERWEIDE. } 2075. Indictment for conspiracy.

At this day comes Thomas Ward, junior, esquire, district attorney, who prosecutes the pleas of the United States in this behalf: and thereupon, on his motion,

It is ordered by the court that a bench warrant issue herein against the defendants, returnable forthwith, and that the said defendants be let to bail before an United States commissioner in the sum of ten thousand dollars ($10,000) each for their appearance before the court on the first day of the next regular term thereof, and from day to

day and term to term thereafter, to answer unto this said indictment until discharged.

In the district court of the United States for the district of Colorado, sitting at Denver.

| | |
|---|---|
| THE UNITED STATES OF AMERICA, *vs.* WILLIAM R. MASON AND JOSEPH VANDERWEIDE. | No. 2075. Indictment for conspiracy, in violation of sections 5508 and 5509, R. S. U. S. |

24 *Stipulation.*

It is now here mutally stipulated, in open court, by and between the United States, as plaintiff in the above-entitled cause and proceeding, represented by its district attorney, Thomas Ward, jr., and the defendants, by their attorney, John M. Waldron, that the said defendants may file a demurrer to the said indictment and each and every count thereof, and may, at the time of filing the said demurrer, also file a plea in bar, in the nature of a plea of former acquittal, to so much and that part of each and every count in said indictment as charges the defendants with the crime of having killed and murdered the deceased, mentioned in said indictment, said charge of murder being based upon section 5509, United States Revised Statutes, and that the filing of said demurrer shall be without prejudice, in any respect, to the said plea, and likewise the said plea shall be without prejudice, in any respect, to the said demurrer.

And the said defendants shall have to and including May 28th, 1908, within which to file said demurrer and plea.

It is further stipulated that the said United States shall have ten days from and after the filing of said plea and demurrer within which to plead or demur to said special plea, as aforesaid; and the defendants' said demurrer to the said indictment, and the demurrer or other pleading of the said United States to the said plea and pleas
25 in bar, may be heard, argued together and submitted at one and the same time.

THOMAS WARD, JR.,
*United States District Attorney.*

JNO. M. WALDRON,
*Attorney for Defendants.*

(Endorsed:) No. 2075. In the District Court of the United States for the District of Colorado. The United States of America *vs.* William R. Mason and Joseph Vanderweide. Stipulation to allow defendants to file demurrer and plea in bar by May 28, '08; U. S. 10 days to demur or plead to plea; all to be argued together. Filed May 14, 1908. Charles W. Bishop, clerk. Thos. Ward, jr., atty. for plaintiff; Jno. M. Waldron, atty. for defendants.

Eighth day, May term, Thursday, May 14th, A. D. 1908.

Present: The Honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of May, A. D. 1908.

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| THE UNITED STATES OF AMERICA, *vs.* WILLIAM R. MASON AND JOSEPH VANDERWEIDE. | 2075. Indictment for conspiracy. |

At this day comes Thomas Ward, junior, esquire, district attorney, who prosecutes the pleas of the United States in this behalf, and the defendants by John M. Waldron, esquire, their attorney, also come. And thereupon, on motion of the defendants and pursuant to a written stipulation thereto herein filed,

26 It is ordered by the court that the defendants may file herein a demurrer to the indictment and each and every count thereof, and may, at the time of filing the said demurrer, also file a plea in bar, in the nature of a plea of former acquittal, to so much and that part of each and every count in said indictment as charges the defendants with the crime of having killed and murdered the deceased, mentioned in said indictment, said charge of murder being based upon section 5509, United States Revised Statutes, and that the filing of said demurrer shall be without prejudice, in any respect, to the said plea, and likewise the said plea shall be without prejudice, in any respect, to the said demurrer.

It is further ordered by the court that the defendants shall have day and to and including the twenty-eighth day of May, 1908, within which to file said demurrer and plea; and that the United States shall have day and to and including ten (10) days from and after the filing of said demurrer and plea by the said defendants within which to plead or demur to said special plea, and the defendants' said demurrer to the indictment and the demurrer or other pleading of the said United States to the said plea in bar, shall be heard, argued together, and submitted at the same time.

27 In the District Court of the United States for the District of Colorado.

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| THE UNITED STATES OF AMERICA *vs.* WILLIAM R. MASON AND JOSEPH VANDERWEIDE. | No. 2075. Indictment for conspiracy in violation of sections 5508 and 5509, R. S. U. S. |

*Joint and several demurrer.*

And now come the defendants, named in the indictment herein, to wit, William R. Mason and Joseph Vanderweide, severally and respectively, and each in his own proper person, and the said defendants, respectively, having heard said indictment read, jointly say, and

each of them for himself severally says, that the said indictment, as well as each and every count thereof, and the matters therein contained, in manner and form as the same are above stated and set forth, is not sufficient in law, and that the said named defendants are not, nor is any or either of them, bound by the law of the land to answer the said indictment or any count thereof, and this the said defendants jointly are, and each of them severally is, ready to verify.

The said defendants above named jointly and severally do further hereby demur to the said indictment as a whole, and to each and every count therein contained separately, and jointly and severally say that the said indictment, as well as each and
28 every count thereof, is wholly insufficient in law, for the following specially stated reasons, to wit:

First. The said indictment does not, nor does either or any count thereof, charge or set forth the commission of any crime or offense by the defendants, or either or any of them, known to or recognized by any statute or statutes or law of the United States.

Second. That the matters and things, and each and every of them, set forth and contained in said indictment, and each and every count thereof, do not charge the entering into by the defendants, or either of them, of a criminal conspiracy within the meaning of sections 5508 and 5509 of the Revised Statutes of the United States, or either of them, or of any other statute or statutes enacted by the Congress of the United States.

Third. Because it affirmatively appears from the allegations contained in said indictment, and in each and every count thereof, that the said Joseph A. Walker, John E. Chapson, Thomas J. Callaghan, and Thomas Harper, were not, nor were either or any of them, exercising or enjoying any right or privilege secured to them or either of them by the Constitution or laws of the United States in their several capacities as citizens of the United States at any
29 of the times mentioned in the said indictment or either or any count thereof.

Fourth. Because it affirmatively appears from the averments contained in said indictment and each and every count thereof, that during all the times mentioned in the said indictment and the said several counts therein contained, that the said Walker, Chapson, Callaghan, and Harper were merely discharging a duty; or had discharged a duty, obligation, and trust specially imposed and enjoined upon them, and each of them, solely by virtue of their employment, position, and station as officers in the service of the United States, or in the holding of a place of trust or confidence thereunder, and were not exercising and had not exercised any rights or privileges whatsoever pertaining to them as citizens of the United States, apart and distinct from their said official position or employment in a place of confidence or trust as aforesaid.

Fifth. Because it affirmatively appears from the averments contained in said indictment and each and every count thereof, that the

alleged conspiracy and conspiracies mentioned therein were not aimed, directed, or intended to the injury, oppression, threatening, or intimidating of the said Walker, Chapson, Callaghan, and Harper, or either of them, on account of or because the said last above-
30 named persons were freely exercising or enjoying or had freely exercised or enjoyed any right or privilege whatsoever secured to them, or either of them, in their several capacities as citizens of the United States, under the Constitution or laws of said United States, but that the objects, purposes, and motives of the said alleged conspiracies and each of them, if any conspiracy whatever is aptly charged, was to obstruct or prevent the discharge of purely official duties, or the discharge of duties pertaining to the employment of said persons, and each of them, in a place of trust or confidence under the laws of the United States, wholly regardless of the federal citizenship or noncitizenship of the said Walker, Chapson, Callaghan, and Harper, or either or any of them.

Sixth. Because the said indictment, and each and every count thereof, solely and specifically attempts and intends to charge offenses under the provisions of sections 5508 and 5509, of the United States Revised Statutes, and it appears upon the face of said indictment that the sole purpose and intent of the grand jury, in finding and returning the same, was to charge offenses under said sections, while the facts pleaded in the said indictment, and each count thereof, affirmatively disclose that the only conspiracy, if any, of which this court could lawfully take cognizance, is the offense of con-
31 spiracy as defined and denounced by sec. 5518, Revised Statutes of the United States, and that the averments of the indictment, and each count thereof, are wholly insufficient in law to aptly charge the commission of an offense by the defendants, or either of them, under said last-named section.

Seventh. The indictment, and each count thereof, fails to charge directly, specifically, and in terms, that the purpose of the alleged conspiracy on the part of the defendants was either to injure, oppress, threaten, or intimidate the said Walker, Chapson, Callaghan, and Harper in the free exercise or enjoyment of any particular or specified right or privilege secured to them, or either of them, by the Constitution or laws of the United States, or because they, or either of them, had so exercised the same; all that appears in the indictment and each count thereof in that behalf being alleged only inferentially or in the nature of a statement of a legal conclusion.

Eighth. Because the said indictment, and each and every count thereof, fails to charge, with the directness and certainty required by law, that the said defendants, or either of them, in fact knew or had any notice, at any of the times mentioned in said indictment, that the said Walker, Chapson, Callaghan, and Harper were then
32 and there in fact holding any office or place of trust or confidence, or had been in any manner appointed or employed as agents for or on behalf of the said United States, or that said named

persons, or either of them, were in fact citizens of the United States, or were then and there exercising or had exercised any right or privilege by virtue or because of such citizenship.

Ninth. Because the said indictment does not, nor does either or any count thereof, set forth or allege, with the certainty and precision required by law, the means intended and conspired to be employed, to carry out the alleged purposes and objects of the conspiracy and conspiracies mentioned in the said indictment, and the said several counts thereof, nor does said indictment, nor either nor any count thereof, charge or set forth with the certainty and precision required by law, how or in what manner the alleged conspiracy or conspiracies contemplated that the objects or purposes thereof should ever be accomplished or carried into effect; it being wholly uncertain, from the allegations contained in said indictment and the said several counts thereof, whether the overt acts, or any of them, alleged to have been committed in pursuance of the said conspiracies, or any of them, were acts which in fact were intended, agreed, or contemplated to be performed at the time of the formation or entering into of the said conspiracy or conspiracies.

33 Tenth. Because the averments contained in the said indictment, and each and every count thereof, are uncertain, indefinite, and ambiguous, in this, to wit:

That it remains wholly uncertain from said averments whether the purposes and objects of the alleged conspiracy or conspiracies were to obstruct, hinder, impede, or interfere with the alleged investigations and reports, or because of investigations and reports already made, of and concerning the lands particularly described and set forth in each of the several counts in said indictment, or whether the objects and purposes of the said conspiracies related to the discharge of the duties and functions of the said Walker, Chapson, Callaghan, and Harper with reference to public lands of the United States generally within the district of Colorado.

Eleventh. Because the said indictment and each and every count thereof lacks the precision and certainty required by law in a criminal pleading, with reference to the allegations therein contained relative to alleged fraudulent and unlawful entry of coal and other public lands of the United States, in this, to-wit:

A. There are no allegations whatsoever contained in said
34 indictment, or either count thereof, stating or alleging the nature or character of the alleged frauds or unlawful acts practiced in connection with the entry of the lands therein referred to, although it is charged in express terms generally in each of said counts that certain described lands had been theretofore unlawfully entered in fact.

B. In that the said indictment, and each count thereof, fails to charge with the certainty required by law, or at all, whether or not any criminal statute or law of the United States has been violated

in connection with any of the entries referred to in the said indictment, or in any count thereof.

C. In that it is wholly uncertain from the averments contained in said indictment, and each and every count thereof, whether it is meant to be charged thereby that any lands of the United States (other than those specifically mentioned and described therein) had in fact been unlawfully or fraudulently entered, or that any wrong, civil or criminal, had in fact been committed against the United States, in connection with said entries, or either of them, or that any wrong was even suspected to have been committed in the premises by the said United States, or any of its officers, agents, or representatives, including the said Walker, Chapson, Callaghan, and Harper.

35 Twelfth. Because if said indictment should be treated as an attempt to charge the commission of any offense other than a violation of section 5508, R. S. U. S., there is a misjoinder or improper joinder of offenses contained and set forth therein, and therefore it is bad for duplicity in this, to wit:

That in each and every of the counts contained in said indictment the defendants are charged with the commission of an alleged criminal conspiracy in violation of the laws of the United States, and in the same count there is likewise contained a specific charge of murder against the defendants, and also the further charge of the commission of the crime of false imprisonment, and the said charges of murder and false imprisonment, respectively, are offenses solely cognizable by the courts of and under the laws of the State of Colorado, save and except in connection with the prosecution for conspiracy under the provisions of sec. 5508 of the Revised Statutes of the United States, and the matters and things mentioned and set forth in said indictment and each and every count thereof do not aptly or at all charge the violation by these defendants, or either of them, of the provisions of said section 5508.

Thirteenth. Because it appears from the averments contained in the said indictment, and each and every count thereof, that at
36 the time of the formation of the said alleged conspiracy and conspiracies, and at the time of the alleged attempted carrying out of the same, the said Walker, Chapson, Callaghan, and Harper were not, nor were either or any of them, then and there engaged in the free exercise or enjoyment of any right or privilege secured to them or either of them by the Constitution or laws of the United States, or because they, or either of them, had so exercised the same, and likewise that the said last above-named persons were not then and there, nor were either of them, discharging any duties of any office, trust, or place of confidence under the United States, nor were they or either of them engaged in the lawful discharge thereof; but, on the contrary, it affirmatively appears from the averments contained in said indictment, and each and every count thereof, that during all of the times last aforementioned, the said Walker, Chapson, Callaghan, and Harper, as well as each and every of them, were there and then engaged in violating the legal and constitutional rights of

a third person, to wit, the Porter Fuel Company, and by reason of such illegal conduct by and on the part of the said Walker, Chapson, Callaghan, and Harper, and each and every of them, any right, privilege or authority secured to them, or either of them, either by the Constitution or laws of the United States, as citizens, or any power or authority conferred upon them or either of them, as
37 officers of the United States, or persons holding a position or place of trust or confidence thereunder, was removed and withdrawn, and they and each of said persons became and were naked trespassers in the premises, ab initio.

Fourteenth. Because so much and that part of each and every count contained in said indictment, which charges these defendants with the crime of false imprisonment, is wholly insufficient in this, to wit:

That it affirmatively appears from the averments contained in said counts, and each of them, that at the time and in connection with the said alleged false imprisonment, neither of the persons so alleged to have been falsely imprisoned, were then and there in the exercise of any right or privilege whatsoever as citizens of the United States, secured to them by the Constitution or laws of the United States, nor were they or either of them engaged in the lawful discharge of any duties or functions whatsoever of any office, or place of trust or confidence under the laws of the United States; but, on the contrary, it expressly appears that the said persons and each of them were then and there naked trespassers and wrongdoers and were then and there engaged in violating the legal and constitutional rights, privileges, and immunities secured by the Constitution
38 and laws of the United States to the Porter Fuel Company, and the said persons were then and there likewise engaged in violating the provisions of the laws of the State of Colorado with reference to the management, control, and operation of coal mines.

Fifteenth. Because so much and that part of each and every count contained in said indictment which attempts to charge these defendants, with the crime of false imprisonment, is wholly uncertain and indefinite in this, to wit:

That for aught that appears in the said parts and portions of the said counts, respectively, the defendants possessed a lawful right to temporarily detain the persons of said Chapson, Callaghan, and Harper, inasmuch as the said last-named persons, and each of them, were then and there naked trespassers, and had unlawfully intruded upon the premises where they were temporarily detained by the defendants, and there are no facts set forth from which it would appear that the said detention or imprisonment was other than temporary and for a lawful purpose.

Sixteenth. And the defendants specially and particularly demur to the second count contained in said indictment, as being insufficient in law, for the following specially stated reasons:

A. The said count charges that the defendants conspired to injure, oppress, threaten, and intimidate the said Walker, Chapson, Callag-

39 han, and Harper, because said named persons had, previous to the information of the alleged conspiracy, freely exercised their alleged right and privilege, secured to them and each of them as citizens of the United States, by the Constitution and laws of the United States, in that the said Walker, Callaghan, Chapson, and Harper had theretofore investigated, discovered, informed of, and reported violations of the laws of the United States, and evidence thereof, concerning and in the matter of fraudulent or illegal entries of the lands described in said count, but the said count wholly fails to set forth the nature, character, or effect of the matters investigated, discovered, informed of, or reported.

B. For aught that appears in said second count, the matters investigated, discovered, informed of, and reported may not have been violations of the laws of the United States, or any evidence on matters tending thereto.

C. Because the alleged matters investigated, discovered, informed of, and reported by the said Walker, Chapson, Callaghan, and Harper, as alleged violations of the laws of the United States and evidence thereof, may have been, for aught that appears in said count, matters and things of and concerning which the said Walker, Chapson, Callaghan, and Harper may not have been invested

40 with any right, power, or privilege to consider, investigate, or in any manner make reports of and concerning.

Seventeenth. And the defendants further demur to the said second count upon every and all of the several grounds of demurrer hereinbefore specially mentioned and set forth, with reference to said indictment and each and every count thereof.

Eighteenth. And these defendants further demur to said indictment, and each count thereof, and say that this court is without jurisdiction to take cognizance of any offense under or in violation of sec. 5509, U. S. R. S., and is therefore without authority to hear, try or punish herein the alleged murder or false imprisonment set out in either or all of the counts in said indictment, and eliminating said murder and false imprisonment charges from said counts, sufficient will not remain therein to constitute the requisite facts necessary to be set forth in charging a conspiracy under sec. 5508, U. S. R. S.

And for other good and sufficient reasons appearing of record.

Wherefore, for want of a sufficient indictment in this behalf, the said defendants above-named, jointly and severally, pray judgment, and that by the court the said defendants and each and every of them may be dismissed and discharged from the said

41 premises in the said indictment specified; this demurrer and the foregoing prayer thereof to be held, deemed, and treated to be without prejudice to the defendants' pleas in bar, in the nature of a former acquittal of and concerning the charge of murder contained in each and every of the counts set forth in said indictment; this demurrer having been filed by consent of the United States, and by

leave of court first had and obtained, with the right to file contemporaneously therewith said plea and pleas in bar.

JNO. M. WALDRON,
*Attorney for Defendants.*

(Endorsed:) No. 2075. In the District Court of the United States for the District of Colorado. The United States of America vs. William R. Mason and Joseph Vanderweide. Joint and several demurrer to indictment. Filed May 28, 1908. Charles W. Bishop, clerk. Jno. M. Waldron, attorney for defendants.

In the District Court of the United States for the District of Colorado.

THE UNITED STATES OF AMERICA
*vs.*
WILLIAM R. MASON AND JOSEPH VANDERWEIDE.

No. 2075. Indictment for conspiracy in violation of sections 5508 and 5509, R. S. U. S.

*Special pleas in bar to the charge of murder set out in the indictment.*

42 And the said defendants, William R. Mason and Joseph Vanderweide, each in his own proper person, now come into court, and having heard the said indictment read, and each protesting that he is not guilty of the premises charged in the said indictment, or of any offense whatsoever set forth therein, now jointly say and each for himself severally says:

That the said United States ought not further to prosecute so much and that particular part and portion of the first count in said indictment which charges these defendants with the violation of section 5509, United States Revised Statutes, in the matter of the alleged murder of the Joseph A. Walker mentioned in said first count (the said part and portion of said first count to which this plea is addressed and directed begins with the words: "That in pursuance of said unlawful and felonious conspiracy," where said words first appear in said count, on pages 3 and 4 of the indictment herein, and all matters mentioned and charged immediately and thereafter following said words, down to, inclusive of, and ending with the following words, to wit: "And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said William R. Mason and Joseph Vanderweide, him, the said Joseph A. Walker,

43 in the manner aforesaid, unlawfully, purposely, and of deliberate and premeditated malice, did kill and murder, while exercising his said right and privilege under the Constitution and laws of the United States" (appearing on page 5 of the indictment herein), because, as these defendants jointly and severally say, and hereby assert the fact to be, they have been heretofore in due manner of law acquitted of the premises in and by said part and

portion of said indictment above specified and charged upon them. And for plea to said part and portion of said first count of said indictment, so charging them with the crime of murder, as aforesaid, they say that the said United States ought to be barred and precluded from further prosecuting said part or portion of said indictment upon said charge of murder against them, because heretofore, to wit, at and in the District Court of La Plata County, in the State of Colorado, at a term thereof duly held pursuant to the laws of the State of Colorado, at the court-house in the city of Durango (said city being the county seat of said county of La Plata), and which said District Court was then and there, on, to wit, the 4th day of November, A. D. 1907, duly convened and in open session, the following proceedings were had and done in said court, to wit:

That on the said 4th day of November, A. D. 1907, the same being one of the judicial days of said term of said District Court, presided over by the Honorable Charles A. Pike, sole pre-
44 siding judge of said District Court, in the county and at the court-house aforesaid, upon due application of James A. Pulliam, esquire, who was then and there district attorney within and for the judicial district of said State, including said county of La Plata, duly elected and acting as such, and authorized to prosecute the pleas of the people of the State of Colorado in that behalf, did present to and ask leave of said District Court of said county of La Plata to file an information, numbered 723, against these defendants, charging them with the commission of the identical murder of the said Joseph A. Walker mentioned and set forth in the said part and portion of said indictment in this court, and to which said part and portion of said indictment, as aforesaid, this plea is directed.

That the said District Court of La Plata County, Colorado, did then and there grant leave to the said district attorney of said county of La Plata to file said information, a good and sufficient affidavit of probable cause for the filing of said information being then and there presented to and filed in said court.

That thereupon, after the granting of said leave to file said information as aforesaid, the said James A. Pulliam, district attorney, as aforesaid, pursuant to and by virtue of full and complete au-
45 thority vested in him in the premises by the laws of the State of Colorado, did file his official information in due form of law in said District Court for said La Plata County on said 4th day of November, 1907, in and by which said information these defendants were in due form of law charged with the commission of the identical crime of murder of the said Joseph A. Walker that is mentioned and set forth in the said part and portion of the said first count of the indictment herein, and to which said charge of murder this plea in bar is specially addressed and directed as aforesaid.

That immediately after the filing of said information as aforesaid, an order was duly made and entered by the said District Court within and for said county of La Plata, ordering and directing

a capias to forthwith issue, returnable forthwith, for the arrest of these defendants upon the said charge of murder as aforementioned.

That a capias was thereupon issued in the premises, pursuant to the laws of the State of Colorado in that behalf, and these defendants were thereafter arrested and taken into custody by the sheriff of the said county of La Plata upon the said charge of murder by virtue of the capias before mentioned, and thereafter, on the 8th day of November, A. D. 1907, and during the said term of court, as
46 aforesaid, these defendants were duly arraigned upon the said information so charging them with the crime of murder as aforesaid, and did then and there severally enter their respective pleas of not guilty to said charge.

And thereupon divers and sundry proceedings in the said cause and prosecution of the people of the State of Colorado, as plaintiff, against these defendants upon the said charge of murder, so contained in said information, were duly had.

And thereafter, pursuant to due orders and continuances by said District Court of La Plata County in the premises, the said cause and prosecution of the people of the State of Colorado against these defendants upon the said charge of murder contained in the said information, and the said issues joined therein, duly came on for trial before a jury, duly impaneled, selected, and sworn in the premises in the said District Court within and for said county of La Plata, at a term thereof duly convened and held at said county seat, in the month of April, A. D. 1908, the said jury being so duly impaneled and sworn to try said issues on the 24th day of April, 1908, the same being one of the regular judicial days of the said term, so being duly held in the said month of April. Thereupon the said court and jury, on divers days after the impaneling of said jury, and during said term, did hear the testimony of witnesses duly sworn and ex-
47 amined, both on behalf of the people of the State of Colorado as well as these defendants, upon the said charge of murder contained in said information.

That after the conclusion of said testimony, the said issues so joined as aforesaid were duly submitted to the said jury for their verdict in the premises, after due argument by respective counsel, both on behalf of the people of the State of Colorado, as well as the defendants, and after being duly charged and instructed by the said District Court of and concerning the law and the duties of said jury in that behalf, during the said April term of the said District Court, in and for said county of La Plata, the said jury did duly return a verdict in the said cause and prosecution of the people of the State of Colorado against these defendants, in and by which verdict the said jury found these defendants, and each of them, not guilty of the said charge of murder; and thereupon and thereafter, at said April term, pursuant to said verdict, the said District Court within and for said county of La Plata, did duly render and enter a judgment upon said verdict, discharging these defendants of and from

said charge of murder, without day, and that they and their sureties, of and from their recognizances, should be fully and freely discharged; as by the record thereof in the said court remaining, all and singular, the proceedings aforementioned, more fully and
48 at large appears, a full and complete copy of said record, including all orders and entries and said verdict and judgment in said cause and prosecution of the said State of Colorado against these defendants, upon said charge of murder, is herewith given, the same being in words and figures as follows, to wit:

Number 723. In the District Court of the Sixth Judicial District of the State of Colorado, in and for La Plata County.

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| THE PEOPLE OF THE STATE OF COLORADO *versus* WILLIAM R. MASON AND JOSEPH VANDERWEIDE. | Transcript of record, John M. Meuser, clerk. |

UNITED STATES OF AMERICA,
*State of Colorado, La Plata County, ss:*

In the District Court, November term, A. D. 1907.

Pleas before the Honorable Charles A. Pike, sole presiding judge of the District Court of La Plata County, in the State of Colorado, at a term thereof begun and held at the court-house in the city of Durango, in said county, on the first day (being the fourth day) of November, in the year of our Lord one thousand nine hundred and seven and of the independence of the United States the one hundred and thirty-first.

Present: Honorable Charles A. Pike, judge; James A. Pulliam, esq., district attorney; John Clarke, sheriff.

Attest: John M. Meuser, clerk.

49 Be it remembered, that heretofore and on the fourth day of November, A. D. 1907, the same being one of the days of the November, A. D. 1907, term of said District Court, the following proceedings, inter alia, were had and done, to wit:

UNITED STATES OF AMERICA,
*State of Colorado, La Plata County, ss.*

In the District Court, November term, A. D. 1907.

Pleas before the Honorable Charles A. Pike, sole presiding judge of the District Court of La Plata County in the State of Colorado, at a term thereof begun and held at the court-house in the city of Durango in said county on the first day (being the fourth day) of November in the year of our Lord one thousand nine hundred and seven and of the independence of the United States the one hundred and thirty-first.

Present: Honorable Charles A. Pike, judge, James A. Pulliam, esq., district attorney, John Clarke, sheriff.
Attest: John M. Meuser, clerk.

Be it remembered that heretofore and on the fourth day of November, A. D. 1907, the same being one of the days of the November, A. D. 1907, term of the said District Court, the following proceedings, inter alia, were had and done, to wit:

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| The People of the State of Colorado *vs.* William R. Mason and Joseph Vanderweide. | No. 723. Order on information. |

Now, on this day comes James A. Pulliam, esq., district attorney, who prosecutes the pleas of the people in this behalf, and
50 presents and asks leave of court to file an information, numbered 723 herein, on the criminal docket of this court. And the court being now sufficiently advised in the premises, and a good and sufficient affidavit of probable cause having been filed herein;

It is ordered by the court that the said district attorney do now have permission to file such information. It is ordered by the court that a capias issue herein for the said William R. Mason and Joseph Vanderweide, instanter, returnable forthwith.

Said affidavit of probable cause and said information being in words and figures as follows, to wit:

State of Colorado,
*County of La Plata, ss.*

In the District Court.

Edward J. Brennan, a credible person of lawful age, being first duly sworn, upon oath says, that he a resident of the city of Saint Louis, in the State of Missouri, and that he is at the present time located in the city of Durango, State of Colorado, and in the employ of the Department of Justice of the United States.

Affiant further states that he was personally and well acquainted with one Joseph A. Walker, who was up to and prior to the 3rd day of November, 1907, in the employ of the Government of the United States as a special employee in the Department of Justice, and on the third day of November, 1907, said Walker was in the vicinity of Hesperus, in said La Plata County, Colorado, with John E. Chapson, Thomas J. Callahan, and Thomas Harper, making investigations and looking up evidence in certain cases now pending in the United States courts at Denver, Colorado. And at the hour of about ten o'clock in the forenoon of said third day of November, 1907, in said La Plata County, Colorado, said Joseph A. Walker was shot and killed, at a point west of Hesperus, Colorado, a distance of a mile or a mile and one-half that while he was shot and killed as
51 aforesaid he was guarding an entrance to a mine in which said

Chapson, Callahan, and Harper had entered to make investigations and measurements.

Affiant further says that the said Joseph A. Walker was shot and killed with a shotgun, some five or six shots or bullets having entered his neck and left shoulder, coming from behind and from the left, and from the effects of said shots and wounds the said Walker then and there died.

Affiant further says that William R. Mason and Joseph Vanderweide came upon the said Joseph A. Walker, while he was guarding the entrance of said mine, and shot and killed said Walker and left him lying on the dump and rode away, and that after the said Walker had been shot and killed, as aforesaid, the said William R. Mason and the said Vanderweide loosen'd the rope and tackle and dropped the same into the shaft, and placed guards at the said shaft and also at mouth of tunnel to ascertain who was down into the shaft, if any person or persons, and thereafter the said Mason and Vanderweide went to the town of Hesperus and gave their shotgun to one Struthers, and thereafter stated and admitted that they had killed the said Joseph A. Walker.

So affiant says that on or about the 3rd day of November, A. D. 1907, in La Plata County, State of Colorado, the said William R. Mason and Joseph Vanderweide, unlawfully, willfully, feloniously, and of their deliberately premiditated malice aforethought, did kill and murder Joseph A. Walker, a human being in the peace of the people then and there being.

Affiant further says that he knows the above facts of his own personal knowledge, and that he a competent person and witness to testify on the trial of the said Mason and Vanderweide, on the charge of having killed and murdered said Joseph A. Walker.

Affiant further says that the said William R. Mason and the said Joseph Vanderweide have not had a preliminary examination on the above charge.

EDWARD J. BRENNAN.

52 Subscribed in my presence and sworn to before me this 4th day of November, A. D. 1907.

[SEAL.] JOHN M. MEUSER,
*District Clerk.*

(Endorsed:) Filed Nov. 4th, 1907, John M. Meuser, clerk.

STATE OF COLORADO,
*County of La Plata, ss:*

In the District Court.

THE PEOPLE OF THE STATE OF COLORADO
*against*
WILLIAM R. MASON AND JOSEPH VANDERWEIDE. } Information.

Of the November term of the District Court within and for the county of La Plata, in the sixth judicial district of the State of Colorado, in the year of our Lord one thousand nine hundred and seven.

Be it remembered that James A. Pulliam, esquire, the duly elected, qualified, and acting district attorney in and for the county, district, and State aforesaid, who prosecutes on behalf of the people of the State of Colorado, comes here in person into court, at this November term thereof, and the necessary affidavit hereto having been duly made, and by leave of the court first had and obtained and in the name and by the authority of the people of the State of Colorado, gives the court to understand and be informed: That William R. Mason and Joseph Vanderweide, late of the county of La Plata and State of Colorado, on or about the third day of November, in the year of our Lord one thousand nine hundred and seven, at and within the county and State aforesaid, unlawfully, willfully, feloniously, and of their deliberately premeditated malice aforethought, did kill and murder Joseph A. Walker, a human being in the peace of the people then and there being, contrary to the form of the statute in such
53 case made and provided, and against the peace and dignity of the same people of the State of Colorado.

JAMES A. PULLIAM,
*District Attorney.*

Wherefore the said district attorney prays the consideration of the court here in the premises, and that due process of law may be awarded against them, the said William R. Mason and Joseph Vanderweide, in this behalf to make them answer to the said the people of the State of Colorado touching and concerning the premises aforesaid.

JAMES A. PULLIAM,
*District Attorney.*

STATE OF COLORADO,
*County of La Plata, ss:*

James A. Pulliam, district attorney, being first duly sworn according to law, upon his oath deposes and says: That the facts stated in the foregoing information are true according to the best of his knowledge, information, and belief.

JAMES A. PULLIAM.

Subscribed and sworn to before me this 4th day of November, A. D. 1907.

JOHN M. MEUSER,
*District Clerk.*

STATE OF COLORADO,
*County of La Plata, ss:*

Edward J. Brennan, of lawful age, being first duly sworn according to law, upon his oath deposes and says: That he is a resident of city of St. Louis, State of Missouri; the facts stated in the foregoing information are true, and the offense therein charged was committed of his own personal knowledge.

EDWARD J. BRENNAN.

Subscribed and sworn to before me this 4th day of November, A. D. 190 & 7.

JOHN M. MEUSER,
*District Clerk.*

54 Presented in open court this 4*y*th day of November, 1907, by James A. Pulliam, esq., district attorney, and thereupon leave is asked to file the foregoing information, and the court, being advised, doth grant leave to file the same.

CHARLES A. PIKE, *Judge.*

Let capias issue returnable forthwith, and defendant be admitted to bail in the sum of $ , to be taken and approved by the sheriff.

Dated November 4th, 1907.

CHARLES A. PIKE, *Judge.*

(Endorsed upon the back thereof:) People's witnesses: Thomas Harper, Thomas J. Callahan, John E. Chapson, Edward J. Brennan, Almer A. Gorman, John Clarke, Dr. H. C. Lefurgey, Dr. John Haggart, Dr. A. L. Davis, Lucian Wheeler, George Goodman, Cliff Crawford, Wm. D. Collins, John Dennison, Joe Curtet, Mrs. Jos. A. Walker, D. F. Camp, Gardien Lacombe, Wm. H. Boyd, Emanuel Snyder, Riss Phillips, Frank W. Wilkerson, Frank Hall, Ivan Thomas, Santiago Gardunio, Lee Sheek, Edwin Bluck, Ernest W. Shaw, Lee Knapp, John Cunningham, Thos. H. Tully, E. H. Martin.

No. 723. November term, A. D. 1907. La Plata County, District Court, State of Colorado. The People of the State of Colorado against William R. Mason and Joseph Vanderweide. Infor-
55 mation for murder. James A. Pulliam, district attorney of the sixth judicial district. By leave of court filed this 4th day of November, A. D. 1907. John M. Meuser, clerk.

UNITED STATES OF AMERICA,
*State of Colorado, La Plata County, ss.*

In the District Court, November term, A. D. 1907.

Pleas before the Honorable Charles A. Pike, sole presiding judge of the District Court of La Plata County in the State of Colorado, at a term thereof begun and held at the court-house in the city of Durango in said county on the fifth day (being the eighth day) of November in the year of our Lord one thousand nine hundred and seven and of the independence of the United States the one hundred and thirty-first.

Present: Honorable Charles A. Pike, judge; James A. Pulliam, esq., district attorney; John Clarke, sheriff.

Attest: John M. Meuser, clerk.

Be it remembered, that heretofore and on the eighth day of November, A. D. 1907, the same being one of the days of the November, A. D. 1907, term of said District Court, the following proceedings, inter alia, were had and done, to wit:

THE PEOPLE OF THE STATE OF COLORADO
*vs.*
WILLIAM R. MASON AND JOSEPH VANDERWEIDE. } No. 723. Order on arraignment and plea of not guilty.

At this day comes James A. Pulliam, esq., district attorney, who prosecutes the pleas of the people in this behalf, and the said defendants, William R. Mason and Joseph Vanderweide, are brought into court and by Russell & Reese and Wilson & McCloskey, their attorneys, also come.

56 And thereupon the said defendants, William R. Mason and Joseph Vanderweide, are arraigned, and the reading of this said information being by them expressly waived, they are required to plead thereunto. Whereupon they answer and say that they are not guilty in manner and form aforesaid, as in and by this said information they stand charged. And of this they put themselves upon the country, and the district attorney doth the like.

Be it further remembered that thereafter the following motion and affidavits were filed, to wit:

STATE OF COLORADO,
*County of La Plata*, ss.

In the District Court.

THE PEOPLE OF THE STATE OF COLORADO,
plaintiff,
*vs.*
WILLIAM R. MASON AND JOSEPH VANDERWEIDE,
defendants.

Come now the above-named defendants in their own proper persons, as well as by their attorneys, Russell & Reese and Wilson & McCloskey, and move the court that the defendants and each of them be admitted to bail herein in a reasonable sum for their appearance herein to answer to the charge in this information.

And in support of this application file herein the annexed affidavits.

RUSSELL & REESE,
WILSON & MCCLOSKEY.

STATE OF COLORADO,
*County of La Plata*, ss.

In the District Court.

57 THE PEOPLE OF THE STATE OF COLORADO, PLAINTIFF,
*vs.*
WILLIAM R. MASON AND JOSEPH VANDERWEIDE, DEFENDANTS.

William R. Mason, of lawful age, being first duly sworn, on his oath deposes and says that he is one of the defendants in the above-entitled action.

That on Sunday, the third day of November, 1907, this affiant and his codefendant, Joseph Vanderweide, were on horseback traveling over and examining the lands owned by the Porter Fuel Company, in and under the surface of which lies a coal mine now being operated by said company and having its main entrance at or near the town of Hesperus, and in the operation of which coal mine this affiant was and for a long time prior had been the superintendent and in charge thereof.

That on said third day of November, while affiant and said Vanderweide were traveling over said land they came near an air shaft connected with the main entry of said mine and sunk and used to obtain air for the working of said mine, and on coming in view of said air shaft discovered the deceased, Joseph A. Walker, at the surface opening of said air shaft and discovered a rope tied and hanging down said air shaft, when this affiant got off his horse, when within about ninety feet of said shaft, and started towards said shaft for the purpose of discovering who deceased was and what he was doing. That at said time affiant did not know who the person was at said shaft and did not think that such person was any person in the employ of the United States from the fact that all employees and agents of the United States had always been afforded ample opportunities to examine the mine and all parts thereof, and the said air shaft being connected with the main entry of said mine, access to same
58 could easily be had through said main entry. That affiant was not armed and had no weapon of any kind or nature.

That when affiant approached within about 12 or 14 feet of deceased, deceased called upon affiant to stop and almost immediately afterwards repeated the command, when deceased fired at affiant with a pistol or revolver and immediately began preparing to shoot at affiant a second time when the said Vanderweide fired at deceased for the purpose of saving affiant's life and preventing the deceased from killing affiant, who was then and there unarmed, and thereby killed the deceased.

That there were no other person or persons present at the t. ıe of said shooting except this affiant, the said Vanderweide and deceased, and no other person or persons witnessed said shooting. That after the said shooting this affiant and the said Vanderweide left the place of said shooting and went to the town of Hesperus, where affiant informed the persons whom he saw there of what had occurred and sent word to Durango of what had occurred, and immediately with the said Vanderweide began making arrangements to come to Durango and place themselves in charge of the officers of the law, and did voluntarily on said third day of November surrender to the sheriff of this county, under whose charge and in whose custody they have been ever since.

That the said Edward J. Brennan, who made the affidavit of probable cause herein and on which affidavit the information herein is based, was not present at the time and place when and where said

shooting occurred, and that, while the said Brennan has sworn in his said affidavit that he knows the facts set forth in said affidavit of his own personal knowledge, affiant says that said statement is not true, but is false and that said Brennan has no personal knowledge of the facts surrounding or accompanying the said shooting and was not an eyewitness thereto and did not see the same.

59 That no preliminary examination of this affiant or his codefendant has ever been had or held, and that affiant and his codefendant have repeatedly, through their attorneys, requested and demanded of the coroner of this county that he hold a coroner's inquest over the body of the deceased and investigate the facts and circumstances of the said killing and take the testimony of witnesses in regard thereto, but the said coroner has always refused, and does still refuse, to hold such inquest or any inquest, and has refused, and does still refuse, to make any investigation whereby the testimony of witnesses can be obtained in regard to said shooting and the circumstances surrounding the same and presented to this court on this application.

That ever since the third day of November this affiant and his codefendant have been confined and have had no proper opportunity to prepare their defense to said charge. That affiant and his codefendant are not guilty of the crime charged against them in the information herein, and neither they nor either of them on said third day of November or on any other day or at any time or place did unlawfully, willfully, feloniously, or of their deliberate, premeditated malice aforethought kill and murder the said Joseph A. Walker, but affiant avers that the said Vanderweide killed the said Walker in order to prevent this affiant from being killed at the hands of the said Walker.

That at the present time there is a large force of detectives and special officers in the employ of the United States in this county engaged in gathering evidence to be used against this affiant and his codefendant at the trial of this cause, and said detectives and special officers have established a system of espionage on these defendants, their attorneys, and friends, sending spies to watch the officers of their said attorneys, and by intimidation, threats, offers of inducements, and the procuring aid of susceptible newspapers are

60 seeking to inflame public sentiment against this affiant and his codefendant and prevent defendants from discovering and presenting evidence favorable to themselves, and by some means unknown to this affiant have so far succeeded in preventing the coroner of this county from performing his clear duty under the law in holding an inquest as provided by law, whereby the facts relating to said shooting could and would be brought out and preserved for presenting to the court on this application.

W. R. MASON.

Subscribed and sworn to before me, this 8th day of November, A. D. 1907.

[SEAL.] JOHN M. MEUSER, *Clerk.*

STATE OF COLORADO,
*County of La Plata, ss:*

Joseph Vanderweide, of lawful age, being first duly sworn, on oath deposes and says that he is the same person who, with William R. Mason, is jointly charged with the killing of Joseph A. Walker.

That he has read the foregoing affidavit of William R. Mason and knows the contents thereof, and that the matters and things therein set forth are true of his own knowledge.

JOSEPH VANDERWEIDE.

Subscribed and sworn to before me, this 8th day of November, A. D. 1907.

[SEAL.] JOHN M. MEUSER, *Clerk.*

(Endorsed:) The People of the State of Colorado vs. Wm. R. Mason & Joseph Vanderweide. Application for bail. Filed Nov. 8th, 1907. John M. Meuser, clerk.

THE PEOPLE OF THE STATE OF COLORADO
*vs.*
WILLIAM R. MASON AND JOSEPH VANDERWEIDE. } No. 723. Order on application for bail.

61 Now, on this day comes James A. Pulliam, esq., district attorney, who prosecutes the pleas of the people in this behalf, and the said defendants, William R. Mason and Joseph Vanderweide, are brought into court, and by Russell & Reese and Wilson & McCloskey, esqs., their attorneys, also come.

And thereupon this cause coming on to be heard upon the application of the defendants herein for an order of court admitting them to bail, and after hearing the evidence and arguments of counsel and the court being now sufficiently advised in the premises,

It is ordered by the court that the said William R. Mason and Joseph Vanderweide be, and they are hereby, let to bail in the sum of twenty thousand dollars ($20,000) each, with sureties to be taken and approved by the sheriff.

UNITED STATES OF AMERICA,
*State of Colorado, La Plata County, ss:*

In the District Court, November term, A. D. 1907.

Pleas before the honorable Charles A. Pike, sole presiding judge of the District Court of La Plata County in the State of Colorado, at a term thereof begun and held at the court-house in the city of Durango in said county, on the nineteenth day (being the twenty-fifth day) of November in the year of our Lord one thousand nine hundred and seven and of the independence of the United States the one hundred and thirty-first.

Present: Honorable Charles A. Pike, judge; James A. Pulliam, esq., district attorney; John Clarke, sheriff.

Attest: John M. Meuser, clerk.

Be it remembered, that heretofore and on the nineteenth day of November, A. D. 1907, the same being one of the days of
62 the November, A. D. 1907, term of said district court, the following proceedings, inter alia, were had and done, to wit:

THE PEOPLE OF THE STATE OF COLORADO
*vs.*
WILLIAM R. MASON AND JOSEPH VANDERWEIDE. } No. 723. Order setting for trial.

At this day comes James A. Pulliam, esq., district attorney, who prosecutes the pleas of the people in this behalf, and the said defendants, William R. Mason and Joseph Vanderweide, are brought into court and by their attorneys, Russell & Reese and Wilson & McCloskey, esqs., also come.

And thereupon it was by the court ordered that this cause be set for trial the second Monday in February, being the tenth (10th) day of February, 1908.

UNITED STATES OF AMERICA,
*State of Colorado, La Plata County, ss:*

In the District Court, November term, A. D. 1907.

Pleas before the honorable Charles A. Pike, sole presiding judge of the District Court of La Plata County in the State of Colorado, at a term thereof begun and held at the court-house in the city of Durango in said county on the twenty-first day (being the 27th day of January) in the year of our Lord one thousand nine hundred and eight and of the independence of the United States the one hundred and thirty-second.

Present: Honorable Charles A. Pike, judge; James A. Pulliam, esq., district attorney; John Clarke, sheriff.

Attest: John M. Meuser, clerk.

Be it remembered, that heretofore and on the 27th day of
63 January, A. D. 1908, the same being one of the days of the November, A. D. 1907, term of the said District Court, the following proceedings, inter alia, were had and done to wit:

THE PEOPLE OF THE STATE OF COLORADO
*vs.*
WILLIAM R. MASON AND JOSEPH VANDERWEIDE. } No. 723. Order on continuance.

At this day comes James A. Pulliam, esq., district attorney, who prosecutes the plea of the people in this behalf, and upon his motion, the defendants, by their attorneys, consenting thereto, it is ordered by the court that this cause be, and the same is hereby, continued for the term.

It is further ordered by the court that the bonds of the defendants herein be continued.

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| THE PEOPLE OF THE STATE OF COLORADO *vs.* WILLIAM R. MASON AND JOSEPH VANDERWEIDE. | No. 723. Order entering appearance attorneys. |

At this day come Messrs. Searcy & Russell, esqs., and enter their appearance as attorneys for and on behalf of the defendants herein.

Be it further remembered that on the 27th day of January, 1908, the same being one of the days of the regular November, 1907, term of said court, the following affidavit was filed in said cause:

STATE OF COLORADO,
*County of La Plata, ss:*

In the District Court.

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| THE PEOPLE OF THE STATE OF COLORADO, plaintiff, *vs.* WILLIAM R. MASON AND JOSEPH VANDERWEIDE, defendants. | Affidavit. |

64

William R. Mason and Joseph Vanderweide, being each duly sworn, on their oaths depose and say that they are the defendants in the above-entitled action; that said action has been commenced and is now pending is said court.

That John Clarke is the duly elected, qualified, and acting sheriff in and for said La Plata County, Colorado.

That H. C. Lefurgey is the duly elected, qualified, and acting coroner in and for said La Plata County, Colorado.

That the said John Clarke and H. C. Lefurgey have held their respective offices ever since and for a long period prior to the date of the commission of the offence with which defendants stand charged herein.

That the said John Clarke, sheriff, is so prejudiced against these defendants and each of them that he is not a fit or proper officer or person to serve the jurors herein, or any paper or process in this action, and these defendants verily believe that the said John Clarke, sheriff, by reason of partiality, prejudice, and interest will not perform the duties of said office faithfully in said suit and action.

That these affiants were arrested by the said John Clarke as such sheriff on or about the fourth day of November, A. D. 1907, on a warrant or capias issued out of this court. That ever since the time of said arrest and before said time said John Clarke has persistently sought to create a popular feeling against these defendants, and has persistently sought to create the impression and belief among the people of this county that these defendants were guilty, and has sought to influence persons who are likely to become witnesses herein

to assent and consent to the making and giving of unfriendly statements against these defendants, and has constantly and persistently used his influence and his official position to endeavor to procure the conviction of these defendants.

65 That these defendants cannot and will not receive a fair and impartial trial in this cause if the said John Clarke is allowed to act and exercise the powers pertaining to his office in and about the service of process, writs, and orders of this court issued or made herein and to be executed or served in and about the trial of said cause.

That these defendants believe that the said H. C. Lefurgey, coroner aforesaid, by reason of partiality, prejudice, and interest, will not faithfully discharge or perform his duties as coroner or sheriff in said action.

That ever since the date of the homicide with the commission of which these defendants stand charged the said H. C. Lefurgey has at all times refused to perform his official duty in holding an inquest and investigating the facts and circumstances of said homicide, although request was made of him, the said Lefurgey, to hold said inquest by said defendants and their attorneys.

That said Lefurgey is so prejudiced against these defendants that he cannot and will not discharge the duties of his office or of the office of sheriff in a fair and impartial manner in serving the jurors or other process or orders of the court in this action.

Affiants further state that the said John Clarke, sheriff, and the said H. C. Lefurgey, coroner, are and each of them is so prejudiced against these defendants as to unfit them and each of them from acting in the proper discharge of their duties in and about the service of any writs or process or orders of this court herein, and that if permitted to do so these affiants cannot and will not have a fair and impartial trial herein.

Wherefore these affiants pray that this court do make an order herein appointing some discreet, unprejudiced, fit, and proper person to act as elisor herein and to serve the jurors and all orders, writs, and process herein.

WILLIAM R. MASON.

66 JOSEPH VANDERWEIDE.

Subscribed and sworn to before me this 27th day of January, A. D. 1908.

[SEAL.] JOHN M. MEUSER, *Clerk.*

(Endorsed:) No. 723. The People of the State of Colorado vs. Wm. R. Mason and Joseph Vanderweide. Affidavit of prejudice of sheriff. Filed January 27th, 1908. John M. Meuser, clerk.

UNITED STATES OF AMERICA,
*State of Colorado, La Plata County, ss:*

In the District Court.

THE PEOPLE OF THE STATE OF COLORADO
*vs.*
WILLIAM R. MASON AND JOSEPH VANDERWEIDE.

No. 723. Order appointing elisor.

Now, on this day come the said defendants and file with the clerk of this court their affidavit alleging prejudice of the sheriff and coroner of this county.

And that John Clarke is the duly elected, qualified, and acting sheriff in and for said La Plata County, Colorado;

That H. C. Lefurgey is the duly, elected, qualified, and acting coroner in and for said La Plata County, Colorado;

That the said John Clarke, sheriff, is so prejudiced against these defendants and each of them that he is not a fit or proper person or officer to serve the jurors herein, or any paper or process in this action, and these defendants verily believe that the said John Clarke, sheriff, by reason of partiality, prejudice, and interest, will not perform the duties of said office faithfully in said suit and action.

That these defendants believe that the said H. C. Lefurgey, coroner aforesaid, by reason of partiality, prejudice, and interest, will not faithfully perform or discharge his duties as coroner or sheriff in said action.

67 And the said defendants now moving the court to appoint a suitable person as elisor to serve the processes, papers, and jurors in said cause, and the court being now fully advised in the premises,

It is ordered by the court that Henry M. Andrew be, and hereby is, appointed as elisor to serve all processes, papers, and jurors in this cause, and

It is further ordered by the court that the clerk of this court direct all processes in this cause, including the summoning of special veniremen and talesmen, as well as all other processes in said case number 723, only, to the said Henry M. Andrew, as elisor, and the said Henry M. Andrew, as elisor, is hereby ordered and directed to serve all of said processes.

UNITED STATES OF AMERICA,
*State of Colorado, La Plata County, ss.*

In the District Court, April term, A. D. 1908.

Pleas before the Honorable Charles A. Pike, sole presiding judge of the District Court of La Plata County, in the State of Colorado, at a term thereof begun and held at the court-house, in the city of Durango in said county on the eighth day (being the 14th day of April, in the year of our Lord one thousand nine hundred and eight

and of the independence of the United States the one hundred and thirty-second.

Present: Honorable Charles A. Pike, judge; James A. Pulliam, esq., district attorney; John Clarke, sheriff.

Attest: John M. Meuser, clerk.

Be it remembered, that heretofore and on the fourteenth day of April, A. D. 1908, the same being one of the days of the April, A. D. 1908, term of the said district court, the following proceedings, inter alia, were had and done, to wit:

68 THE PEOPLE OF THE STATE OF COLORADO *vs.* WILLIAM R. MASON AND JOSEPH VANDERWEIDE. } No. 723. Order appointing additional elisor.

Now, on this day it appearing to the court that the elisor heretofore by the court appointed herein, to wit, Henry M. Andrew, is unable to serve all the jurors and witnesses in this cause and make return on the summons and other processes of this court by April 20th, 1908, the date heretofore set for trial herein,

It is therefore ordered by the court that M. B. Bates be and he is hereby appointed as an additional elisor to serve any and all processes in this cause.

UNITED STATES OF AMERICA,
*State of Colorado, La Plata County, ss.*

In the District Court, April term, A. D. 1908.

Pleas before the Honorable Charles A. Pike, sole presiding judge of the District Court of La Plata County in the State of Colorado, at a term thereof begun and held at the court-house in the city of Durango in said county on the first day (being the sixth day) of April in the year of our Lord one thousand nine hundred and eight and of the independence of the United States the one hundred and thirty-second.

Present: Honorable Charles A. Pike, judge; James A. Pulliam, esq., district attorney; John Clarke, sheriff.

Attest: John M. Meuser, clerk.

Be it remembered, that heretofore and on the sixth day of April, A. D. 1908, the same being one of the days of the April, A. D. 1908, term of said district court, the following proceedings, inter alia, were had and done, to wit:

69 THE PEOPLE OF THE STATE OF COLORADO *vs.* WILLIAM R. MASON AND JOSEPH VANDERWEIDE. } No. 723. Order setting for trial.

Now, on this day comes James A. Pulliam, esq., district attorney, who prosecutes the pleas of the people in this behalf, and the said defendants, William R. Mason and Joseph Vanderweide, are brought

into court and by Russell & Reese, Wilson & McCloskey, and Searcy & Russell, their attorneys, also come; and, thereupon, by consent of the parties, it is ordered by the court that his cause be set down for trial on Monday, the 20th day of April, 1908, at 10 o'clock a. m.

And now, at this time, it is ordered by the court, that the clerk of this court, with the assistance of the elisor, draw from the list of names of persons heretofore furnished him by the county commissioners of this county of La Plata, the names of one hundred (100) men, to be used as jurors in this trial; and this is accordingly done, and the following names are so drawn:

Dave Atterbury, R. L. Alexander, H. J. Brady, W. N. Bagby, Robert Buck, W. H. Boyd, A. C. Bagby, Will G. Bates, A. J. Chitwood, Geo. B. Cooper, Fred C. Carbis, James Curl, M. B. Daniels, Grover Dawson, Andy Erler, Ernest Feichtinger, Oliver Foster, J. W. Gedney, jr., George Geisler, A. F. Hood, Virgil Hammer, H. T. Henry, Casper Helton, I. N. Jack, Al Kroeger, Walter R. Ambold, W. H. Anderson, W. A. Benjamin, Wm. J. Boyle, Jasper Burnett, James Bennett, B. H. Bennett, T. J. Bradshaw, John Casey, Andrew Y. Cook, Arc Campbell, Philip H. Craig, James Dennison, George Dale, Dan'l W. Eaton, Elmer B. Fleisher, James Frazier,
70 E. G. Gibson, Frank P. Hall, A. Hahn, Carl Hendrickson, Jess Hammond, Wm. J. Iredale, Harry Kettlewell, E. H. Kimsey, Jess Acord, C. H. Barton, Albert Bernard, E. D. Billings, Fred R. Bonnell, C. Brinkerhoff, H. D. Brindle, Sam Campbell, Jos. A. Clark, Wm. Crawley, Sam Cook, F. E. Carmack, Ralph Dunham, C. H. Dartt, John R. Eaton, G. T. Ford, H. F. Gillespie, Rob't Gillespie, Dan W. Hoover, Ed Harbaugh, W. H. Hawkins, C. A. Hoffman, Harry Jackson, Isaac Kruschke, Chas. Lindgren, G[illegible]. F. Akers, H. S. Butler, Mart Bushnell, Frank Bobeck, F. D. Bove[illegible] Fred Brandiger, Wm. A. Bay, James Callery, F. Cunha, jr., Frank M. Crowell, John Cunningham, H. L. Dixon, Chas. De Luche, Fred. J. Egan, W. E. Faris, J. W. Fowler, Grant Gifford, R. C. Gaines, J. Hargesheimer, E. A. Hutchinson, Leonard Hawkins, A. M. Helton, John Juby, Geo. W. Kerr, A. E. Lund.

And it is further ordered by the court that a special venire issue without delay, directed to the said elisor, commanding him to summon the persons so drawn to serve as petit jurors, said venire to be in four sections, returnable on Monday, April 20th, 1908, at 10 o'clock a. m.

UNITED STATES OF AMERICA,
*State of Colorado, La Plata County, ss.*

In the District Court, April term, A. D. 1908.

Pleas before the Honorable Charles A. Pike, sole presiding judge of the District Court of La Plata County, in the State of Colorado, at a term thereof begun and held at the court-house in
71 the city of Durango in said county, on the eleventh day (being the 17th day) of April, in the year of our Lord one thousand

nine hundred and eight and of the independence of the United States the one hundred and thirty-second.

Present: Honorable Charles A. Pike, judge; James A. Pulliam, esq., district attorney; John Clarke, sheriff.

Attest: John M. Meuser, clerk.

Be it remembered, that heretofore and on the 17th day of April, A. D. 1908, the same being one of the days of the April, A. D. 1908, term of said District Court, the following proceedings, inter alia, were had and done, to wit:

THE PEOPLE OF THE STATE OF COLORADO
*vs.*
WILLIAM R. MASON AND JOSEPH VANDERWEIDE. } No. 72. Order.

*To the Honorable John Cleghorn, Warden of the Penitentiary of the State of Colorado, at Canon City, Colorado:*

Upon the filing and the reading of the affidavit of James A. Pulliam, esq., district attorney within and for the sixth judicial district, State of Colorado, and it appearing therefrom that one Santiago Gardunio is a material and important witness for and on behalf of the people of the State of Colorado in the above-entitled cause, and that the said witness is now confined in the penitentiary of the State of Colorado, at Canon City, Colorado, and the judge of said court being now fully advised in the premises,

We command you, John Cleghorn, esq., warden as aforesaid, that you do forthwith, without excuse or delay, bring or cause to be brought before the District Court of the Sixth Judicial District, sitting
72 within and for the county of La Plata, at the city of Durango, in the State of Colorado, on the 22d day of April, A. D. 1908, at the hour of ten o'clock in the forenoon of said day, the body and person of Santiago Gardunio, by whatever name or addition he is known or called, and who is detained in your custody, as it is said, to the end that the said Santiago Gardunio may be produced, sworn, and testify as a witness for and on behalf of the people of the State of Colorado in the above-entitled cause.

Then and there to perform and abide such other and further order and direction of the said court shall make in that behalf. Dated Durango, Colorado, April 17th, 1908.

(Signed) CHARLES A. PIKE,
*Judge of the District Court,*
*Sixth Judicial District, State of Colorado.*

UNITED STATES OF AMERICA,
*State of Colorado, La Plata County, ss:*

In the District Court, April term, 1908.

Pleas before the Honorable Charles A. Pike, sole presiding judge of the District Court of La Plata County, in the State of Colorado,

at a term thereof begun and held at the court-house, in the city of Durango, in said county, on the thirteenth day (being the 20th day) of April, in the year of our Lord one thousand nine hundred and eight, and of the independence of the United States the one hundred and thirty-second.

Present: Honorable Charles A. Pike, judge; James A. Pulliam, esq., district attorney; John Clarke, sheriff.

Attest: John M. Meuser, clerk.

Be it remembered, that heretofore and on the 20th day of April, A. D. 1908, the same being one of the days of the April, A. D.
73 1908, term of said District Court, the following proceedings were had and done, to wit:

Now on this day come H. M. Andrew and Martin B. Bates, elisors heretofore duly appointed by the court, to serve all processes in the case of The People of the State of Colorado versus William R. Mason and Joseph Vanderweide, and return into court the special venire of petit jurors heretofore issued and made returnable at 10 o'clock a. m. of this day, with their indorsements thereon written that they have thereunder summoned the following good and lawful men to serve as such petit jurors, to wit: David Atterbury, H. S. Butler, Mart Bushnell, Frank Bobeck, A. C. Bagby, John Casey, C. A. Hoffman, Isaac Kruschke, Oliver Foster, H. D. Brindle, George Geisler, John Juby, T. J. Bradshaw, C. H. Dartt, Casper Helton, Grover Dawson, Geo. B. Cooper, H. L. Dixon, Fred J. Egan, Elmer B. Fleisher, R. C. Gaines, A. F. Hood, Fred Brandiger, W. H. Boyd, Fred C. Carbis, E. D. Billings, Walter R. Ambold, H. J. Brady, W. N. Bagby, C. Brinkerhoff, E. G. Gibson, Jos. A. Clark, W. J. Iredale, Geo. W. Kerr, Geo. F. Akers, Arch Campbell, Virgil Hammer, B. H. Bennett, William Crawley, Geo. Dale, Robert Gillespie, James Curl, Chas. De Luche, E. Feitchtinger, John W. Gedney, jr., Jacob Hargesheimer, G. T. Ford, Leonard Hawkins, F. D. Bovee, Jas. Dennison, Jess Acord, W. A. Banjamin, William J. Boyle, James Bennett, Jas. Callery, Frank Cunha, jr., Chas. Lindgren, Harry Jackson, W. G. Bates, F. E. Carmack, Jess Hammond, I. N. Jack, R. L. Alexander, Carl Hendrickson, A. M. Helton, John R. Eaton, Sam Cook, Ralph Dunham, W. E. Faris, Grant Gifford, Dan W. Hoover, Ed Harbaugh, W. H. Hawkins, Jasper Burnett, Frank M. Crowell, E. H. Kimsey, C. H. Barton, Albert Bernard, Robert Buck, Sam Campbell, A. J. Chitwood, E. A. Hutchison, Harry Kettlewell, A. E. Lund, William A. Bay, J. W. Fowler, Fred R. Bonnell, Philip H. Craig, W. H. Anderson, Daniel W. Eaton, Andrew Y. Cook, M. B. Daniel, Andy Erler, H. F. Gillespie, Frank P. Hall, A. Hahn, John Cunningham, H. T. Henry, Al. Kroeger, James Frazier.

74 C. A. Hoffman, Oliver Foster, H. D. Brindle, T. J. Bradshaw, C. H. Dartt, Geo. B. Cooper, R. C. Gaines, G. T. Ford, Leonard Hawkins, Chas. Lindgren, W. G. Bates, I. N. Jack, Carl Hendrickson, W. H. Hawkins, Frank Crowell, Robert Buck, Harry

Kettlewell, Jas. Frazier, and C. Brinkerhoff were returned as not found.

And for good and sufficient reasons to the court appearing A. C. Bagby, John Casey, Isaac Kruschke, George Geisler, Casper Helton, H. L. Dixon, W. H. Boyd, E. D. Billings, E. G. Gibson, W. J. Iredale, Geo. W. Kerr, Geo. F. Akers, Arch Campbell, Wm. Crawley, Geo. Dale, J. W. Gedney, jr., Harry Jackson, Jess Hammond, John R. Eaton, Sam Crook, Ralph Dunham, W. E. Faris, Ed Harbaugh, C. H. Barton, Sam Campbell, E. A. Hutchison, A. E. Lund, W. H. Anderson, Daniel W. Eaton, Frank P. Hall, A. Hahn, John Cunningham, and H. T. Henry were excused from serving as such petit jurors.

The same, those heretofore drawn by the clerk of said court to serve as such petit jurors, pursuant to the statute in such case made and provided; and the same were placed in the jury-box.

THE PEOPLE OF THE STATE OF Colorado
*vs.*
WILLIAM R. MASON AND JOSEPH Vanderweide.
} No. 723. Trial order, first day.

Now, on this day comes James A. Pulliam, esq., district attorney, who prosecutes the pleas of the people in this behalf, and the said defendants, William R. Mason and Joseph Vanderweide, are brought into court, and by Russell & Reese and Wilson & McCloskey and Searcy & Russell, their attorneys, also come.

And thereupon comes the empanelling of a jury, which is proceeded with to the hour of adjournment, and not being concluded, the case is continued until 9 o'clock a. m. of Tuesday, April 21st, 1908.

And the said being each duly cautioned by the court
75 not converse among themselves nor with others touching the matters at issue herein, nor to listen to such conversation of others, not to read or hear read any publication bearing upon the same, are committed to the custody of two sworn bailiffs who are charged by the court not to allow said jurors to separate or to converse or hold intercourse with others, and to meet the court at its next incoming at 9 o'clock a. m. April 21st, 1908.

THE PEOPLE OF THE STATE OF COLORADO
*vs.*
WILLIAM R. MASON AND JOSEPH VANDERWEIDE.
} No. 723. Order to indorse witnesses.

Now, on this day comes James A. Pulliam, esq., district attorney, who prosecutes the pleas of the people in this behalf, and asks and is given permission to indorse upon the information herein the names of the following witnesses, to wit: E. H. Martin, Thos. Tulley, Lucien Wheeler, Geo. Goodman, Cliff Crawford, Wm. D. Collins, John Dennison, Joe Curtet, Mrs. Jos. A. Walker, D. F. Camp, Gardien La Combe, Wm. H. Boyd, Emmanuel Snyder, Ress Philips,

Frank W. Wilkerson, Frank Hall, Ivan Thomas, Santiago Gardunio, Lee Sheek, Edwin Bluck, Ernest W. Shaw, Lee Knapp, John Cunningham.

UNITED STATES OF AMERICA,
*State of Colorado, La Plata County, ss:*

In the District Court, April term, A. D. 1908.

Pleas before the honorable Charles A. Pike, sole presiding judge of the District Court of La Plata County in the State of Colorado, at a term thereof begun and held at the court-house, in the city of Durango in said county, on the fourteenth day (being the 21st day) of April, in the year of our Lord one thousand nine hundred
76 and eight and of the independence of the United States the one hundred and thirty-second.

Present: Honorable Charles A. Pike, judge; James A. Pulliam, esq., district attorney; John Clarke, sheriff.

Attest: John M. Meuser, clerk.

Be it remembered, that heretofore and on the twenty-first day of April, A. D. 1908, the same being one of the days of the April, A. D. 1908, term of said District Court, the following proceedings were had and done, to wit:

THE PEOPLE OF THE STATE OF COLORADO
*vs.*
WILLIAM R. MASON AND JOSEPH VANDERWEIDE. } No. 723. Trial order, second day.

At this day come again the said parties by their attorneys respectively, the said defendants in their own proper persons being present in court.

And now at this time it is ordered by the court that the clerk of this court, with the assistance of H. M. Andrew, one of the elisors heretofore appointed herein, draw from the list of names of persons heretofore furnished him by the county commissioners of the county of La Plata, the names of forty-eight men to be used in this trial, upon the exhaustion of the present panel. And this is accordingly done and the following names: Hugh Allan, J. P. Anderson, John R. Ball, J. B. Begue, Nial Camp, Chas. D. Cased, A. J. Cook, Chas. Daniels, S. G. Dowdy, T. G. Edwards, Peter Frahm, E. I. Gaines, Thos. Goulding, Frank Hodgson, Milton Kaufman, A. E. Knapp, Roy Caviness, C. H. Handy, Addison Beals, A. W. Ayres, H. B. Bedwell, M. J. Brennan, Geo. W. Carther, Godfrey C. Challen, J. C. Copeland, W. S. Dorn-Blaser, J. H. Eby, Franz Endter, Frank Gabbe, Frank Gonner, D. B. Harmon, J. E. Ivey, Joe Kikel, W. C. Liesenberg, D. F. Hollar, Jas. Fogle, Ritce Daum, Jos. Freed,
77 jr., Ernest V. Clark, M. B. Conley, J. H. Abee, Alva Bailly, C. M. Jones, Marion Drury, Le Roy C. Anderson, W. T. Huntington, J. E. Dale, Francis Grubb, are so drawn.

And it is further ordered by the court that a special venire issue without delay, directed to the elisors heretofore appointed to serve

all process in this cause, commanding them to summon the persons so drawn to serve as petit jurors, said venire to be in four sections, returnable as follows: First section at 9 o'clock a. m. April 22d, 1908; second and third sections at 9 o'clock a. m. April 23d, 1908; fourth section at 2 o'clock p. m. April 23d, 1908.

Thereupon the empanelling of a jury is proceeded with, and the present panel becoming exhausted, the case is continued till 9 o'clock a. m. April 22d, 1908.

And the said jurors being each duly cautioned by the court not to converse among themselves nor with others touching the matters at issue herein, nor to listen to such conversation of others, nor to read or hear read any publication bearing upon the same, are committed to the custody of two sworn bailiffs, who are charged by the court not to allow said jurors to separate or to converse or hold intercourse with others, and to meet the court at its next incoming at 9 o'clock a. m. April 22d, 1908.

THE PEOPLE OF THE STATE OF COLORADO
*vs.*
WILLIAM R. MASON AND JOSEPH VANDERWEIDE. } No. 723. Order appointing additional elisor.

Now, on this day it appearing to the court that the elisors heretofore appointed, to wit, H. M. Andrew and M. B. Bates, are unable to serve all jurors in this cause and have summons and other process returned by April 23, 1908,

It is therefore ordered by the court that Henry Garbanati, jr., be, and he hereby is, appointed as an additional elisor to serve any and all processes in this case.

78 UNITED STATES OF AMERICA,
*State of Colorado, La Plata County, ss:*

In the District Court, April term, A. D. 1908.

Pleas before the honorable Charles A. Pike, sole presiding judge of the District Court of La Plata County, in the State of Colorado, at a term thereof begun and held at the court-house in the city of Durango, in said county, on the fifteenth day (being the 22d day) of April, in the year of our Lord one thousand nine hundred and eight, and of the independence of the United States the one hundred and thirty-second.

Present: Honorable Charles A. Pike, judge; James A. Pulliam, esq., district attorney; John Clarke, sheriff.

Attest: John M. Meuser, clerk.

Be it remembered that heretofore and on the 22 day of April, A. D. 1908, the same being one of the days of the April, A. D. 1908, term of said District Court, the following proceedings were had and done, to wit:

And now again comes H. M. Andrew, one of the elisors heretofore appointed to serve all summons and process in the case of The People of the State of Colorado versus William R. Mason and Joseph Vanderweide, and returns into court here the first section of the

venire heretofore issued on April 21st, 1908, said first section made returnable at this day and hour, with his indorsement thereon written that he hath thereunder summoned the following named good and lawful men to serve as such petit jurors, to wit: Niel Camp, Milton Kaufman, Geo. W. Carther, Hugh Allan, H. B. Bedwell, Chas. Daniels, A. W. Ayres, Godfrey C. Challen, A. E. Knapp, T. G. Edwards, C. D. Casad, J. B. Begue, M. J. Brennan, John R. Ball, Frank Gabbe, Thos. Goulding, J. C. Copeland, S. G. Dowy, J. H. Eby, D. B. Harmon, A. J. Cook, Frank Gonner, J. P. Ander-
79 son, W. S. Dorn Blaser, Joe Kikel, W. C. Liesenberg.

J. H. Eby, D. B. Harmon, A. J. Cook, Chas. Daniels, Thos. Goulding, J. P. Anderson, and A. W. Ayres were returned by said elisor as not found.

And for good and sufficient reasons to the court appearing T. G. Edwards, John R. Ball, and M. J. Brennan were excused from serving as such petit jurors.

The same those heretofore and on the 21st day of April, 1908, drawn by the clerk of said court to serve as such petit jurors, pursuant to the statute in such cases made and provided, and the same were placed in the jury box.

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|---|---|
| THE PEOPLE OF THE STATE OF COLORADO<br>*vs.*<br>WILLIAM R. MASON AND JOSEPH VANDERWEIDE. | No. 723. Trial order, third day. |

At this day come again the said parties by their attorneys, respectively, the said defendants in their own proper persons being present in court.

And it now appearing to the court that there is not a sufficient number of petit jurors present to complete the panel in this case, and it further appearing to the court that sections two, three, and four of the special venire heretofore issued on April 21st, 1908, will not be returnable till April 23d, 1908, at 9 o'clock a. m. and 2 o'clock p. m., it is therefore ordered by the court, the defendants by their counsel consenting thereto, that the further hearing of this case be continued to April 23d, 1908, at 9 o'clock a. m.

And the said jurors being each duly cautioned by the court not to converse among themselves nor with others touching the matters at issue herein nor to listen to such conversation of others, not to read or hear read any publication upon the same, are committed to
80 the custody of two sworn bailiffs who are charged by the court not to allow said jurors to separate or to converse or hold intercourse with others and to meet the court at its next incoming at 9 o'clock a. m. April 23d, 1908.

UNITED STATES OF AMERICA,
*State of Colorado, La Plata County, ss:*

In the District Court, April term, A. D. 1908.

Pleas before the honorable Charles A. Pike, sole presiding judge of the District Court of La Plata County in the State of Colorado,

at a term thereof begun and held at the court-house in the city of Durango in said county on the sixteenth day (being the 23d day) of April in the year of our Lord one thousand nine hundred and eight and of the independence of the United States the one hundred and thirty-second.

Present: Honorable Charles A. Pike, judge; James A. Pulliam, esq., district attorney; John Clarke, sheriff.

Attest: John M. Meuser, clerk.

Be it remembered, that heretofore and on the twenty-third day of April, A. D. 1908, the same being one of the days of the April, A. D. 1908, term of the said district court, the following proceedings were had and done, to wit:

THE PEOPLE OF THE STATE OF COLORADO
*vs.*
WILLIAM R. MASON AND JOSEPH VANDERWEIDE. } No. 723. Trial order, fourth day.

At this day come again the said parties by their attorneys respectively, the said defendants in their own proper persons being present in court.

And now again comes H. M. Andrew and M. B. Bates, elisors heretofore duly appointed by the court to serve all processes in
81 the case of The People of the State of Colorado versus William R. Mason and Joseph Vanderweide, and return here into court the second and third sections of the venire heretofore issued on April 21st, 1908, said two sections made returnable at 9 o'clock a. m. this day, with their indorsement thereon written that they have thereunder summoned the following named good and lawful men to serve as petit jurors in this case, to wit: M. B. Conley, J. H. Abee, Ernest V. Clarke, Marion Drury, D. F. Hollar, Addison Beals, E. J. Gaines, Le Roy C. Anderson, Francis F. Grubb, Jos. Freed, jr., C. H. Handy, Ritce Daum, Franz Endter, Peter Frahm.

E. J. Gaines, Francis F. Grubb, and Ritce Daum were returned by said elisors as not found.

For good and specific reasons to the court appearing, C. H. Handy, Jos. Freed, jr., Franz Endter, Peter Frahm, and Addison Beals were excused from serving as such petit jurors.

And it again appearing to the court that there is not a sufficient number of jurors present,

It is ordered that court be in recess until 2 o'clock p. m. this day to await the return of the fourth section of the venire for petit jurors heretofore issued and made returnable at the above day and hour.

And now again on this day comes Henry Garbanati, jr., elisor heretofore appointed by the court to serve all processes in the case of The People of the State of Colorado versus William R. Mason and Joseph Vanderweide, and returns into court here the fourth section of the venire for petit jurors heretofore issued on April 21st, 1908, said section made returnable at 2 o'clock p. m. of this day, with his indorsement thereon written that he hath thereunder summoned

the following-named good and lawful men to serve as such petit jurors, to wit: Alva Bailly, Roy Caviness, J. E. Dale, Frank Hodgson, Jas. Fogle, W. T. Huntington, J. E. Ivey, Chas. M. Jones.

Roy Caviness and J. E. Ivey were returned by said elisor
82 as not found.

And for good and sufficient reasons to the court appearing Alva Bailly and Jas. Fogle were excused from serving as such petit jurors.

The same those heretofore and on the 21st day of April, 1908, drawn by the clerk of said court to serve as such petit jurors, pursuant to the statute in such cases made and provided, were by order of court placed in the jury box.

Thereupon the empaneling of a jury is proceeded with until the hour of adjournment, and not being concluded, the case is continued to 9 o'clock a. m. April 24th, 1908.

And the said jurors being each duly cautioned by the court not to converse among themselves nor with others touching the matters at issue herewith, nor to listen to such conversation of others, nor to read or hear read any publication bearing upon the same, are committed to the custody of two sworn bailiffs, who are charged by the court not to allow said jurors to separate or to converse or hold intercourse with others, and to meet the court at its next incoming at 9 o'clock a. m. April 24th, 1908.

UNITED STATES OF AMERICA,
*State of Colorado, La Plata County, ss:*

In the District Court, April term, A. D. 1908.

Pleas before the honorable Charles A. Pike, sole presiding judge of the District Court of La Plata County, in the State of Colorado, at a term thereof begun and held at the court-house in the city of Durango, in said county, on the seventeenth day (being the 24th day) of April in the year of our Lord one thousand nine hundred and eight and of the independence of the United States the one hundred and thirty-second.

Present: Honorable Charles A. Pike, judge; James A. Pul-
83 liam, esq., district attorney; John Clarke, sheriff.

Attest: John M. Meuser, clerk.

Be it remembered that heretofore and on the twenty-fourth day of April, A. D. 1908, the same being one of the days of the April, A. D. 1908, term of the said District Court, the following proceedings were had and done, to wit:

THE PEOPLE OF THE STATE OF COLORADO
WILLIAM R. MASON AND JOSEPH VANDERWEIDE. } No. 723. Trial order, fifth day.

Now, on this day come again the said parties by their attorneys, respectively, the said defendants in their own proper persons being present in court.

And thereupon the empanelling of a jury is proceeded with and the present panel becoming exhausted,

It is now ordered by the court that a special open venire issue without delay directed to the elisors heretofore appointed by the court to serve all processes in the case of The People of the State of Colorado versus William R. Mason and Joseph Vanderweide, commanding them to summon thirty men as petit jurors to be used in this trial, said venire to be in two sections, returnable as follows: The first section at 2 o'clock p. m. of this day and the second at four o'clock p. m. of this day, April 24th, 1908.

And now again on this day comes M. B. Bates, one of the elisors heretofore duly appointed by the court to serve all processes in the case of The People of the State of Colorado versus William R. Mason and Joseph Vanderweide, and returns into court here the first section of the open venire for petit jurors heretofore and on this day issued and made returnable at 2 o'clock p. m. of this day, with his indorsement thereon written that he hath thereunder summoned the following good and lawful men to serve as petit jurors, to wit:

84 W. F. Crenshaw, Taylor Maddox, Thomas Farley, J. F. Cain, Dale Geisse, W. T. Nesbitt, E. W. Luick, John C. Herr, Fred Balcom, J. A. Minner, C. B. Mack, Ross McGirr, Ben Blackburn, James B. Vandaniker, H. P. McConnell.

For good and sufficient reasons to the court appearing, W. F. Crenshaw was excused from serving as such petit juror,

And the same, those heretofore and on this day summoned to serve as such petit jurors were by order of the court placed in the jury box.

And thereupon the empanelling of a jury is proceeded with and concluded.

And thereupon comes a jury, to wit: Virgil Hammer, Wm. J. Boyle, James Dennison, Mart Bushnell, M. B. Conley, A. E. Knapp, John Juby, Albert Bernard, Jacob Hargesheimer, Ernest V. Clarke, Marion Drury, Thomas Farley, twelve good and lawful men, and they are duly selected and tried, empanelled and sworn to well and truly try and a true deliverance make between The People of the State of Colorado and William R. Mason and Joseph Vanderweide, the said defendants, and a true verdict give according to the law and the evidence.

And the said jurors being each duly cautioned by the court not to converse among themselves nor with others touching the matters at issue herein, or the evidence heard, or any part thereof, or to listen to such conversation of others, nor to read or hear read any publication bearing upon the same, are committed to the custody of two sworn bailiffs, who are charged by the court not to allow said jurors to separate or converse or hold intercourse with others, and to meet the court at its next incoming on April 25th, 1908, at 9 o'clock a. m.

UNITED STATES OF AMERICA,
*State of Colorado, La Plata County, ss:*

In the District Court, April term, A. D. 1908.

85 Pleas before the Honorable Charles A. Pike, sole presiding judge of the District Court of La Plata County, in the State of Colorado, at a term thereof begun and held at the court-house in the city of Durango in said county, on the eighteenth day (being the 25th day) of April, in the year of our Lord one thousand nine hundred and eight, and of the independence of the United States the one hundred and thirty-second.

Present: Honorable Charles A. Pike, judge; James A. Pulliam, esq., district attorney; John Clarke, sheriff.

Attest: John M. Meuser, clerk.

Be it remembered that heretofore and on the 25th day of April, A. D. 1908, the same being one of the days of the April, A. D. 1908, term of the said District Court, the following proceedings were had and done, to wit:

THE PEOPLE OF THE STATE OF COLORADO
*vs.*
WILLIAM R. MASON AND JOSEPH VANDERWEIDE. } No. 723. Trial order, sixth day.

Now, on this day come again the said parties by their attorneys respectively, and the said defendants in their own proper persons are present in court. And the said jurors being now all here present in the jury box, the trial of the issues herein joined is resumed.

Thereupon comes the evidence, the hearing of which is continued to the hour of adjournment.

And the said jurors, being each duly cautioned by the court not to converse among themselves nor with others touching the matters at issue herein or the evidence heard, or any part thereof, or to listen to such conversation of others, nor to read or hear read any publication bearing upon the same, are committed to the custody of
86 two sworn bailiffs, who are charged by the court not to allow said jury to separate or converse or hold intercourse with any others, and to meet the court at its next incoming, on April 27th, 1908, at 9 o'clock a. m.

UNITED STATES OF AMERICA,
*State of Colorado, La Plata County, ss:*

In the District Court, April term, A. D. 1908.

Pleas before the Honorable Charles A. Pike, sole presiding judge of the District Court of La Plata County, in the State of Colorado, at a term thereof begun and held at the court-house in the city of Durango in said county on the nineteenth day (being the 27th day)

of April, in the year of our Lord one thousand nine hundred and eight, and of the independence of the United States the one hundred and thirty-second.

Present: Honorable Charles A. Pike, judge; James A. Pulliam, esq., district attorney; John Clarke, sheriff.

Attest: John M. Meuser, clerk.

Be it remembered that heretofore and on the 27th day of April, A. D. 1908, the same being one of the days of the April, A. D. 1908, term of the said District Court, the following proceedings were had and done, to wit:

THE PEOPLE OF THE STATE OF COLORADO
*vs.*
WILLIAM R. MASON AND JOSEPH VANDERWEIDE. } No. 723. Trial order, seventh day.

Now, on this day come again the said parties, by their attorneys, respectively, and the said defendants in their own proper persons are present in court.

And the said jurors, being now all here present and in the jury box, the trial of the issues herein joined is resumed.

87 And thereupon comes the evidence, the hearing of which is continued to the hour of adjournment.

And the said jurors being each duly cautioned by the court not to converse among themselves nor with others touching the matters at issue herein or the evidence heard or any part thereof, or to listen to such conversation of others, nor to read or hear read any publication bearing upon the same, are committed to the custody of two sworn bailiffs, who are charged by the court not to allow said jurors to separate nor to converse or hold intercourse with any others, and to meet the court at its next incoming on April 28th, 1908, at 9 o'clock a. m.

UNITED STATES OF AMERICA,
*State of Colorado, La Plata County, ss:*

In the District Court, April term, A. D. 1908.

Pleas before the Honorable Charles A. Pike, sole presiding judge of the District Court of La Plata County, in the State of Colorado, at a term thereof begun and held at the court-house in the city of Durango, in said county, on the twentieth day (being the 28th day) of April, in the year of our Lord one thousand nine hundred and eight, and of the independence of the United States the one hundred and thirty-second.

Present: Honorable Charles A. Pike, judge; James A. Pulliam, esq., district attorney; John Clarke, sheriff.

Attest: John M. Meuser, clerk.

Be it remembered, that heretofore and on the 28th day of April, A. D. 1908, the same being one of the days of the April, A. D. 1908,

term of the said District Court, the following proceedings were had and done, to wit:

88 THE PEOPLE OF THE STATE OF COLORADO *vs.* WILLIAM R. MASON AND JOSEPH VANDERWEIDE. } No. 703. Trial order, eighth day.

Now, on this day come again the said parties by their attorneys, respectively, and the said defendants in their own proper persons are present in court.

And the said jurors being now all here present and in the jury box, the trial of the issues herein joined is resumed.

And thereupon comes the evidence, the hearing of which is continued to the hour of adjournment.

And the said jurors being each duly cautioned by the court not to converse among themselves nor with others touching the matters at issue herein or the evidence heard or any part thereof, or to listen to such conversation of others, nor to read or hear read any publication bearing upon the same, are committed to the custody of two sworn bailiffs, who are charged by the court not to allow said jury to separate nor converse or hold intercourse with any others and to meet the court at its next incoming on April 29th, 1908, at 9 o'clock a. m.

UNITED STATES OF AMERICA,
*State of Colorado, La Plata County, ss:*

In the District Court, April term, A. D. 1908.

Pleas before the Honorable Charles A. Pike, sole presiding judge of the District Court of La Plata County, in the State of Colorado, at a term thereof begun and held at the court-house in the city of Durango, in said county, on the twenty-first day (being the 29th day) of April, in the year of our Lord one thousand nine hundred and eight, and of the independence of the United States the one hundred and thirty-second.

89 Present: Honorable Charles A. Pike, judge; James A. Pulliam, esq., district attorney; John Clarke, sheriff.
Attest: John M. Meuser, clerk.

Be it remembered, that heretofore and on the 29th day of April, A. D. 1908, the same being one of the days of the April, A. D. 1908, term of the said District Court, the following proceedings were had and done to wit:

THE PEOPLE OF THE STATE OF Colorado *vs.* WILLIAM R. MASON AND JOSEPH Vanderweide. } No. 723. Trial order ninth day.

Now, on this day come again the said parties by their attorneys respectively, the said defendants in their own proper persons being present in court.

And the said jurors being now all here present and in the jury box, he trial of the issues herein joined is resumed.

And thereupon comes the evidence the hearing of which is continued to the hour of adjournment.

And the said jurors being each duly cautioned by the court not to converse among themselves nor with others touching the matters at issue herein or the evidence heard or any part thereof, nor to listen to such conversation of others, nor to read or hear read any publication bearing upon the same, are committed to the custody of two sworn bailiffs, who are charged by the court not to allow said jurors to separate nor converse or hold intercourse with others, and to meet the court at its next incoming on April 30th, 1908, at o'clock a. m.

UNITED STATES OF AMERICA,
*State of Colorado, La Plata County, ss.*

In the District Court, April term, A. D. 1908.

Pleas before the Honorable Charles A. Pike, sole presiding
90 judge of the District Court of La Plata County in the State of Colorado, at a term thereof begun and held at the court-house in the city of Durango, in said county, on the twenty-second day (being the 30th day) of April in the year of our Lord one thousand nine hundred and eight, and of the independence of the United States the one hundred and thirty-second.

Present: Honorable Charles A. Pike, judge; James A. Pulliam, esq., district attorney; John Clarke, sheriff.

Attest: John M. Meuser, clerk.

Be it remembered, that heretofore and on the 30th day of April, A. D. 1908, the same being one of the days of the April, A. D. 1908, term of the said district court, the following proceedings were had and done, to wit:

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| THE PEOPLE OF THE STATE OF Colorado *vs.* WILLIAM R. MASON AND JOSEPH Vanderweide. | No. 723. Trial order tenth day. |

Now, on this day come again the said parties by their attorneys respectively, and the said defendants in their own proper persons being present in court.

Anr the said jurors being now all here present and in the jury box, the trial of the issues herein joined is resumed, and continued to the hour of adjournment.

And the said jurors being each duly cautioned by the court not to converse among themselves nor with others touching the matters at issue herein, nor the evidence heard or any part thereof, nor to listen to such conversation of others, nor to read or hear read

any publication bearing upon the same, are committed to the custody of two sworn bailiffs, who are charged by the court not to allow the said jury to separate nor converse nor hold intercourse with others, and to meet the court at its next incoming on May 1st, 1908, at 9.30 o'clock a. m.

91 UNITED STATES OF AMERICA,
*State of Colorado, La Plata County:*

In the District Court, April term, A. D. 1908.

Pleas before the Honorable Charles A. Pike, sole presiding judge of the District Court of La Plata County in the State of Colorado at a term thereof begun and held at the court-house in the city of Durango in said county on the twenty-third day (being the first day of May) in the year of our Lord one thousand nine hundred and eight and of the independence of the United States the one hundred and thirty-second.

Present: Honorable Charles A. Pike, judge; James A. Pulliam, esq., district attorney; John Clarke, sheriff.

Attest: John M. Meuser, clerk.

Be it remembered, that heretofore and on the first day of May, A. D. 1908, the same being one of the days of the April, A. D. 1908, term of the said District Court, the following proceedings were had and done, to-wit:

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| THE PEOPLE OF THE STATE OF Colorado *vs.* WILLIAM R. MASON AND JOSEPH Vanderweide. | No. 723. Trial order eleventh day. |

Now, on this day come again the said parties by their attorneys respectively, the said defendants in their own proper persons being present in court.

And the said jurors being now all here present and in the jury box, the trial of the issues herein joined is resumed, and thereupon comes the argument of counsel, which are continued to the hour of adjournment.

And the said jurors being each duly cautioned by the court
92 not to converse among themselves nor with others touching the matters at issue herein nor the evidence heard or any part thereof, nor to listen to such conversation of others, nor to read or hear read any publication bearing upon the same, are committed to the custody of two sworn bailiffs, who are charged by the court not to allow said jurors to separate nor converse or hold intercourse with any others, and to meet the court at *tis* next incoming on May 2d, 1908, at 8.30 o'clock a. m.

NITED STATES OF AMERICA,
*State of Colorado, La Plata County, ss:*

In the District Court, April term, A. D. 1908.

Pleas before the Honorable Charles A. Pike, sole presiding judge f the District Court of La Plata County in the State of Colorado, t a term thereof begun and held at the court-house in the city of Durango in said county on the twenty-fourth day (being the second lay of May) in the year of our Lord one thousand nine hundred and ight and of the independence of the United States the one hundred nd thirty-second.

Present: Honorable Charles A. Pike, judge; James A. Pulliam, sq., district attorney; John Clarke, sheriff.

Attest: John M. Meuser, clerk.

Be it remembered, that heretofore and on the second day of May, A. D. 1908, the same being one of the days of the April, A. D. 1908, term of the said District Court, the following proceedings were had and done, to-wit:

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| THE PEOPLE OF THE STATE OF Colorado *vs.* WILLIAM R. MASON AND JOSEPH Vanderweide. | No. 723. Trial order twelfth day. |

93 Now, on this day come the said parties hereto by their attorneys respectively, and the said defendants in their own proper persons being present in court.

And the said jurors being all here present and in the jury box, the trial of the issues herein joined is resumed, proceeded with, and concluded.

And the said jurors having heard the evidence produced herein as well on behalf of the said defendants as of the said people, and the arguments of counsel, and being duly instructed by the court, retire to their room in charge of two sworn bailiffs to consider of their verdict herein.

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| THE PEOPLE OF THE STATE OF COLORADO *vs.* WILLIAM R. MASON AND JOSEPH VANDERWEIDE. | No. 723. Order on verdict. |

Now, again on this day comes James A. Pulliam, esq., district attorney, who prosecutes the pleas of the people in this behalf, and the said defendants, William R. Mason and Joseph Vanderweide are brought into court, and by Russell & Reese, Wilson & McCloskey, and Searcy & Russell their attorneys, also come.

And thereupon come again the said jurors and on their oaths say:

THE PEOPLE OF THE STATE OF COLORADO
*vs.*
WILLIAM R. MASON AND JOSEPH VANDERWEIDE. } No. 723. Verdict.

We, the jury, duly empanelled and sworn, find the defendants, William R. Mason and Joseph Vanderweide, not guilty.

MARION DRURY, *Foreman.*

Wherefore, it is considered by the court that the said defendants, William R. Mason and Joseph Vanderweide, of and from the premises in this said information specified be discharged and
94 go hence hereof without day, and that they and their sureties of and from their recognizance in this behalf be fully and finally discharged.

Which said judgment, so rendered upon said verdict of acquittal, still remains in full force and effect, and is not in the least reversed or made void. The said William R. Mason and the said Joseph Vanderweide, jointly and severally, say that in fact they and each of them so prosecuted and informed against as aforesaid, and acquitted as last aforesaid, are the same persons as are indicted herein, and not other or different persons, and that the crime of murder of which they and each of them were so informed against and acquitted, as aforesaid, and the crime of murder of which they and each of them are now here indicted in this, the District Court of the United States for the District of Colorado, sitting at Denver, in and by the said part and portion of the said first count of the indictment to which this plea is addressed, are one and the same crime and murder, and are no other or different.

That the said Joseph A. Walker, the person charged in the said first count in the indictment herein, to have been feloniously killed and murdered by these defendants in the county of La Plata, in the district of Colorado, on the 3rd day of November, in the year of our Lord, 1907, is the same Joseph A. Walker whom these de-
95 fendants were so informed against and prosecuted, in said District Court of La Plata County, Colorado, for having killed and murdered in the said county, district, and State of Colorado, as aforesaid, on the said 3rd day of November, 1907, and not another or different person.

And these defendants say that the said District Court, within and for said county of La Plata, in the State of Colorado, had and possessed due jurisdiction to take cognizance of all and singular the matters aforesaid, and to hear, try, and determine the said charge of murder as aforementioned. That all of the proceedings in the prosecution aforesaid in the said District Court within and for the said county of La Plata, were in all respects due, regular and bona fide, and are entitled to full faith and credit in this court.

And this the said William R. Mason and Joseph Vanderweide are ready to verify.

Wherefore, they and each of them pray judgment and that by the court they and each of them may be dismissed and discharged from as much of the premises in the present indictment specified, as relates to and concerns the said charge and crime of murder as aforesaid, and included in that part and portion of the said first count of the indictment herein to which this special plea, as aforesaid, is specially directed and addressed.

96 *Special plea in bar to the charge of murder set out in second count of the indictment herein.*

And the said defendants, William R. Mason and Joseph Vanderweide, each in his own proper person, now come into court, and having heard the said indictment read, and each protesting that he is not guilty of the premises charged in the said indictment, or of any offense whatsoever set forth therein, now jointly say and each for himself severally says:

That the said United States ought not further to prosecute so much and that particular part and portion of the second count in said indictment which charges these defendants with the violation of section 5509, United States Revised Statutes, in the matter of the alleged murder of the Joseph A. Walker mentioned in said second count (the said part and portion of said second count to which this plea is addressed and directed, begins with the words "That in pursuance of said unlawful and felonious conspiracy, combination, confederation, and agreement aforesaid, and to effect the object thereof, the said William R. Mason and Joseph Vanderweide thereafter," appearing on page 11 of the indictment herein, and all matters mentioned and charged immediately and thereafter following said words, down to, inclusive of, and ending with the following words, to-wit: "As more particularly charged and set forth in the first count of
97 this indictment, because of having exercised as aforesaid, his said right and privilege under the Constitution and laws of the United States," appearing on page 11 of the indictment herein); because, as these defendants jointly and severally say, and hereby assert the fact to be, they have been heretofore in due manner of law acquitted of the premises in and by said part and portion of said indictment above specified and charged upon them. And for plea to said part and portion of said second count of said indictment, so charging them with the crime of murder, as aforesaid, they say that the said United States ought to be barred and precluded from further prosecuting said part or portion of said indictment upon said charge of murder against them, because heretofore, to wit, at and in the District Court of La Plata county, in the State of Colorado, at a term thereof duly held pursuant to the laws of the State of Colorado, at the court-house in the city of Durango (said city being the county seat of said county of La Plata), and which said District Court was then and there, on, to wit, the 4th day of November, A. D. 1907, duly

convened and in open session, the following proceedings were had and done in said court, to wit:

That on the 4th day of November, A. D. 1907, the same being one of the judicial days of said term of said District Court, presided over by the Honorable Charles A. Pike, sole presiding
98 judge of said District Court, in the county and at the court-house aforesaid, upon due application of James A. Pulliam, esquire, who was then and there district attorney within and for the judicial district of said State, including said county of La Plata, duly elected and acting as such, and authorized to prosecute the pleas of the people of the State of Colorado in that behalf, did present to and ask leave of said District Court of said county of La Plata to file an information, numbered 723, against these defendants, charging them with the commission of the identical murder of the said Joseph A. Walker mentioned and set forth in the said part and portion of said indictment in this court, and to which said part and portion of said indictment, as aforesaid, this plea is directed.

That the said District Court of La Plata County, Colorado, did then and there grant leave to the said district attorney of said county of La Plata to file said information, a good and sufficient affidavit of probable cause for the filing of said information being then and there presented to and filed in said court.

That thereupon after the granting of said leave to file said information as aforesaid, the said James A. Pulliam, district attorney, as aforesaid, pursuant to and by virtue of full and complete authority vested in him in the premises by the laws of the State of
99 Colorado, did file his official information in due form of law in said District Court for said La Plata County on said 4th day of November, 1907, in and by which said information these defendants were in due form of law charged with the commission of the identical crime of murder of the said Joseph A. Walker that is mentioned and set forth in the said part and portion of the said second count of the indictment herein, and to which said charge of murder this plea in bar is specially addressed and directed as aforesaid.

That immediately after the filing of said information as aforesaid, an order was duly made and entered by the said District Court within and for said county of La Plata, ordering and directing a capias to forthwith issue, returnable forthwith, for the arrest of these defendants upon the said charge of murder as aforementioned.

That a capias was thereupon issued in the premises, pursuant to the laws of the State of Colorado in that behalf, and these defendants were thereafter arrested and taken into custody by the sheriff of the said county of La Plata upon the said charge of murder by virtue of the capias before mentioned, and thereafter, on the 8th day of November, A. D. 1907, and during the said term of court, as aforesaid, these defendants were duly arraigned upon said information so
100 charging them with the crime of murder as aforesaid, and did then and there severally enter their respective pleas of not guilty to said charge.

And thereupon divers and sundry proceedings in the said cause and prosecution of the The People of the State of Colorado, as plaintiff, against these defendants upon the said charge of murder so contained in said information, were duly had.

And thereafter, pursuant to due orders and continuances by said District Court of La Plata County in the premises, the said cause and prosecution of The People of the State of Colorado against these defendants upon the said charge of murder contained in the said information, and the said issues joined therein, duly came on for trial before a jury, duly impaneled, selected, and sworn in the premises in the said District Court within and for said county of La Plata, at a term thereof duly convened and held at said county seat, in the month of April, A. D. 1908, the said jury being so duly impaneled and sworn to try said issues on the 24th day of April, 1908, the same being one of the regular judicial days of the said term, so being duly held in the said month of April. Thereupon the said court and jury, on divers days after the impaneling of said jury, and during said term, did hear the testimony of witnesses duly sworn and examined, both on behalf of The People of the State of Colorado as well as

101 these defendants, upon the said charge of murder contained in said information.

That after the conclusion of said testimony, the said issues so joined as aforesaid were duly submitted to the said jury for their verdict in the premises, after due argument by respective counsel, both on behalf of The People of the State of Colorado, as well as the defendants, and after being duly charged and instructed by the said District Court of and concerning the law and the duties of said jury in that behalf, during the said April term of the said District Court, in and for said county of La Plata, the said jury did duly return a verdict in the said cause and prosecution of The People of the State of Colorado against these defendants, in and by which verdict the said jury found these defendants and each of them not guity of the said charge of murder; and thereupon and thereafter, at said April term, pursuant to said verdict, the said District Court within and for said county of La Plata, did duly render and enter a judgment upon said verdict, discharging these defendants of and from said charge of murder, without day, and that they and their sureties of and from their recognizances, should be fully and freely discharged; as by the record thereof, more fully and largely appears, a full, true and complete copy of which record is hereinbefore contained and set forth in the first special plea hereinbefore set forth, directed

102 and addressed to the charge of murder against these defendants, contained in the first count in the indictment herein, reference to which copy of the record as aforesaid is hereby made for the purpose of incorporating the said copy in this special plea, said reference and incorporation being hereby made for purposes of avoiding unnecessary repetition; and the defendants pray that said copy of said record may be held and deemed to have been set forth in full in this special plea.

Which said judgment, so rendered upon said verdict of acquittal, still remains in full force and effect, and is not in the least reversed or made void. The said William R. Mason and the said Joseph Vanderweide, jointly and severally, say that in fact they and each of them so prosecuted and informed against as aforesaid, and acquitted as last aforesaid, are the same persons as are indicted herein, and not other or different persons, and that the crime of murder of which they and each of them were so informed against and acquitted, as aforesaid, and the crime of murder of which they and each of them are now here indicted in this, the District Court of the United States, for the district of Colorado, siting at Denver, in and by the said part and portion of the said second count of the indictment to which this plea is addressed, are one and the same crime and murder, and are no other or different.

103 That the said Joseph A. Walker, the person charged in the said second count in the indictment herein, to have been feloniously killed and murdered by these defendants in the county of La Plata, in the district of Colorado, on the 3rd day of November, in the year of our Lord 1907, is the same Joseph A. Walker whom these defendants were so informed against and prosecuted, in said District Court of La Plata County, Colorado, for having killed and murdered in the said county, district and State of Colorado, as aforesaid, on the said 3rd day of November, 1907, and not another or different person.

And these defendants say that the said District Court, within and for said county of La Plata, in the State of Colorado, had and possessed due jurisdiction to take cognizance of all and singular the matters aforesaid, and to hear, try, and determine the said charge of murder as aforementioned. That all of the proceedings in the prosecution aforesaid in the said District Court within and for the said county of La Plata, were in all respects due, regular, and bona fide, and are entitled to full faith and credit in this court.

And this the said William R. Mason and Joseph Vanderweide are ready to verify.

Wherefore, they and each of them pray judgment and that by the court they and each of them may be dismissed and discharged

104 from as much of the premises in the present indictment specified as relates to and concerns the said charge and crime of murder as aforesaid, and included in that part and portion of the said second count of the indictment herein to which this special plea, as aforesaid, is specially directed and addressed.

*Special plea in bar to the charge of murder set out in third count of the indictment herein.*

And the said defendants, William R. Mason and Joseph Vanderweide, each in his own proper person, now come into court, and having heard the said indictment read, and each protesting that he is not guilty of the premises charged in the said indictment, or of any

offense whatsoever set forth therein, now jointly say and each for himself severally says:

That the said United States ought not further to prosecute so much and that particular part and portion of the third count in said indictment which charges these defendants with the violation of section 5509, United States Revised Statutes, in the matter of the alleged murder of the Joseph A. Walker mentioned in said third count (the said part and portion of said third count to which this plea is addressed and directed, begins with the words "That in pursuance of said unlawful and felonious conspiracy," appearing on page 16 of the indictment herein, and all matters mentioned
105 and charged immediately and thereafter following said words, down to and inclusive of the following words "while exercising, as aforesaid, his said right and privilege under the Constitution and laws of the United States," appearing on the top of page 17 in said indictment herein); because as these defendants jointly and severally say, and hereby assert the fact to be, they have been heretofore in due manner of law acquitted of the premises in and by said part and portion of said indictment above specified and charged upon them. And for plea to said part and portion of said third count of said indictment, so charging them with the crime of murder, as aforesaid, they say that the said United States ought to be barred and precluded from further prosecuting said part or portion of said indictment upon said charge of murder against them, because, heretofore, to wit, at and in the District Court of La Plata County, in the State of Colorado, at a term thereof duly held pursuant to the laws of the State of Colorado, at the court-house in the city of Durango (said city being the county seat of said county of La Plata), and which said District Court was then and there, on, to wit, the 4th day of November, A. D. 1907, duly convened and in open session, the following proceedings were had and done in said court, to wit:

That on the 4th day of November, A. D. 1907, the same being one of the judicial days of said term of said District Court, pre-
106 sided over by the Honorable Charles A. Pike, sole presiding judge of said District Court, in the county and at the court-house aforesaid, upon due application of James A. Pulliam, esquire, who was then and there district attorney within and for the judicial district of said State, including said county of La Plata, duly elected and acting as such, and authorized to prosecute the pleas of the people of the State of Colorado in that behalf, did present to and ask leave of said District Court of said county of La Plata to file an information, numbered 723, against these defendants, charging them with the commission of the identical murder of the said Joseph A. Walker, mentioned and set forth in the said part and portion of said indictment, in this court, and to which said part and portion of said indictment, as aforesaid, this plea is directed.

That the said District Court of La Plata County, Colorado, did then and there grant leave to the said district attorney of said county

of La Plata to file said information, a good and sufficient affidavit of probable cause for the filing of said information being then and there presented to and filed in said court.

That thereupon after the granting of said leave to file said information as aforesaid, the said James A. Pulliam, district attorney, as aforesaid, pursuant to and by virtue of full and complete authority vested in him in the premises by the laws of the State of Colo-
107 rado, did file his official information in due form of law in said District Court for said La Plata County, on said 4th day of November, 1907, in and by which said information these defendants were in due form of law charged with the commission of the identical crime of murder of the said Joseph A. Walker, that is mentioned and set forth in the said part and portion of the said third count of the indictment herein, and to which said charge of murder this plea in bar is specially addressed and directed as aforesaid.

That immediately after the filing of said information as aforesaid, an order was duly made and entered by the said District Court within and for said county of La Plata, ordering and directing a capias to forthwith issue, returnable forthwith, for the arrest of these defendants upon the said charge of murder as aforementioned.

That a capias was thereupon issued in the premises, pursuant to the laws of the State of Colorado in that behalf, and these defendants were thereafter arrested and taken into custody by the sheriff of the said county of La Plata upon the said charge of murder by virtue of the capias before mentioned, and thereafter on the 8th day of November, A. D. 1907, and during the said term of court, as aforesaid, these defendants were duly arraigned upon the said information so charging them with the crime of murder as aforesaid, and did then and
108 there severally enter their respective pleas of not guilty to said charge.

And thereupon divers and sundry proceedings in the said cause and prosecution of The People of the State of Colorado as plaintiff against these defendants upon the said charge of murder so contained in said information were duly had.

And thereafter, pursuant to due orders and continuances by said District Court of La Plata County in the premises, the said cause and prosecution of The People of the State of Colorado against these defendants upon the said charge of murder contained in the said information, and the said issues joined therein duly came on for trial before a jury, duly impaneled, selected and sworn in the premises in the said District Court within and for said county of La Plata, at a term thereof duly convened and held at said county seat, in the month of April, A. D. 1908, the said jury being so duly impaneled and sworn to try said issues on the 24th day of April, 1908, the same being one of the regular judicial days of the said term, so being duly held in the said month of April. Thereupon the said court and jury, on divers days after the impaneling of said jury, and during said term, did hear the testimony of witnesses duly sworn and

examined, both on behalf of The People of the State of Colorado as well as these defendants, upon the said charge of murder contained in said information.

That after the conclusion of said testimony, the said issues
109 so joined as aforesaid, were duly submitted to the said jury for their verdict in the premises, after due argument by respective counsel, both on behalf of The People of the State of Colorado, as well as the defendants, and after being duly charged and instructed by the said District Court of and concerning the law and the duties of said jury in that behalf, during the said April term of the said District Court, in and for said county of La Plata, the said jury did duly return a verdict in the said cause and prosecution of The People of the State of Colorado against these defendants, in and by which verdict the said jury found these defendants and each of them not guilty of the said charge of murder; and thereupon and thereafter, at said April term, pursuant to said verdict, the said District Court within and for said county of La Plata, did duly render and enter a judgment upon said verdict, discharging these defendants of and from said charge of murder, without day, and that they and their sureties of and from their recognizances should be fully and freely discharged; as by the record thereof, more fully and largely appears, a full, true, and complete copy of which record is hereinbefore contained and set forth in the first special plea hereinbefore set forth, directed, and addressed to the charge of murder against these defendants, contained in the first count in the indictment herein, reference to which copy of the record, as aforesaid, is hereby made for the purpose of incorporating the said copy in this special plea, said
110 reference and incorporation being hereby made for purposes of avoiding unnecessary repetition; and the defendants pray that said copy of said record may be held and deemed to have been set forth in full in this special plea.

Which said judgment, so rendered upon said verdict of acquittal, still remains in full force and effect, and is not in the least reversed or made void. The said William R. Mason and the said Joseph Vanderweide, jointly and severaly, say that in fact they and each of them so prosecuted and informed against, as aforesaid, and acquitted as last aforesaid, are the same persons as are indicated herein, and not other or different persons, and that the crime of murder of which they and each of them were so informed against and acquitted, as aforesaid, and the crime of murder of which they and each of them are now here indicted in this, the District Court of the United States, for the district of Colorado, sitting at Denver, in and by the said part and portion of the said third count of the indictment to which this plea is addressed, are one and the same crime and murder, and are no other or different.

That the said Joseph A. Walker, the person charged in the said third count in the indictment herein, to have been feloniously killed and murdered by these defendants in the county of La Plata, in

111 the district of Colorado, on the 3rd day of November, in the year of our Lord 1907, is the same Joseph A. Walker whom these defendants were so informed against and prosecuted, in said District Court of La Plata County, Colorado, for having killed and murdered in the said county, district, and State of Colorado, as aforesaid, on the said 3rd day of November, 1907, and not another or different person.

And these defendants say that the said District Court, within and for said county of La Plata, in the State of Colorado, had and possessed due jurisdiction to take cognizance of all and singular the matters aforesaid, and to hear, try, and determine the said charge of murder as aforementioned. That all of the proceedings in the prosecution aforesaid in the said District Court within and for the said county of La Plata, were in all respects due, regular, and bona fide, and are entitled to full faith and credit in this court.

And this the said William R. Mason and Joseph Vanderweide are ready to verify.

Wherefore they and each of them pray judgment and that by the court they and each of them may be dismissed and discharged from as much of the premises in the present indictment specified, as relates to and concerns the said charge and crime of murder as aforesaid, and included in that part and portion of the said third

112 count of the indictment herein to which this special plea, as aforesaid, is specially directed and addressed.

And these defendants further say that each and all of the foregoing special pleas, are filed herein pursuant to an express stipulation to that effect, by and between them and the said United States, and by leave of court first had and obtained, and entered of record in conformity to such stipulation, by virtue of which stipulation and leave the foregoing pleas are specially authorized to be filed, and contemporaneous therewith that a demurrer by the defendants to the said indictment, and each count thereof, may be filed by the defendants, without prejudice to either of said pleadings on the part of defendants.

And these defendants do further and finally say that in addition to claiming the benefit of each and all rules and principles of law pertaining to the matters and things above pleaded in each and all of the foregoing pleas, they do hereby specifically invoke and claim, by virtue of the premises, the benefit and protection of each and every of the following mentioned provisions of the Constitution of the United States, to wit:

First. That clause of Article V of the amendments to said Constitution, which reads: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

113 Second. And also the further clause in the same article reading: "Nor be deprived of life, liberty or property without due process of law."

Third. And likewise the provisions of section 1, Article IV of the original Constitution of the United States.

Fourth. Also, the concluding clause of Article VII of the amendments to said Constitution, said clause reading: "No fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law."

JNO. M. WALDRON,
*Attorney for Defendants.*

(Endorsed:) No. 2075. In the District Court of the United States for the District of Colorado. The United States of America vs. William R. Mason and Joseph Vanderweide. Special pleas in bar to the charge of murder set out in the indictment. Filed May 28, 1908. Charles W. Bishop, clerk. John M. Waldron, attorney for defendants.

UNITED STATES OF AMERICA,
*District of Colorado, ss:*

In the District Court of the United States within and for the District of Colorado.

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| THE UNITED STATES OF AMERICA *v.* WILLIAM R. MASON AND JOSEPH Vanderweide. | No. 2075. | Indictment for conspiracy. |

114 *Demurrer to special pleas in bar to the charge of murder set out in the indictment.*

And now Thomas Ward, jr., United States attorney for the district of Colorado, who prosecutes pleas of the Government in this behalf, as to said special pleas in bar to the charge of murder set out in the indictment of the said William R. Mason and Joseph Vanderweide, and to each of said pleas by them above pleaded, says, that the same and the matters therein contained in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude the United States of America from prosecuting the said indictment against the said William R. Mason and Joseph Vanderweide as to the charge of murder contained in said indictment and each count thereof, and the said United States of America is not bound by law to answer the same, and this the said Thomas Ward, jr., district attorney, who prosecutes as aforesaid, is ready to verify.

Wherefore, for want of a sufficient plea in this behalf, he, the said Thomas Ward, jr., for the said United States of America, prays judgment that the said indictment may be adjudged good, and each count thereof, as to the charge of murder set out in said indictment, and that the said William R. Mason and Joseph Vanderweide may further answer thereto.

THOMAS WARD, JR.,
*United States Attorney for the District of Colorado.*

115 (Endorsed:) No. 2075. United States District Court, district of Colorado. The United States of America v. William R. Mason and Joseph Vanderweide. Demurrer to special pleas in bar to the charge of murder set out in the indictment. Filed Jun. 8, 1908. Charles W. Bishop, clerk. Thomas Ward, jr., U. S. attorney.

Thirty-first day, May term. Tuesday, July 14th, A. D. 1908.

Present: The honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of May, A. D. 1908.

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| THE UNITED STATES OF AMERICA<br>*vs.*<br>WILLIAM R. MASON AND JOSEPH VANDERWEIDE. | 2075. Indictment for conspiracy. |

At this day comes Thomas Ward, junior, esquire, district attorney, and Sylvester R. Rush, esquire, special asistant to the Attorney-General, who prosecutes the pleas of the United States in this behalf, and the defendants by John M. Waldron, esquire, N. Walter Dixon, esquire, and Reese McCloskey, esquire, their attorneys, also come;

And the joint and several demurrer of the defendants to the indictment herein, and the special pleas in bar of the defendants herein, and the demurrer of the United States to the special pleas in bar herein, coming on now to be heard are argued by counsel to the hour of adjournment.

116 Thirty-second day, May term. Wednesday, July 15th, A. D. 1908.

Present: The Honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of May, A. D. 1908.

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| THE UNITED STATES OF AMERICA<br>*vs.*<br>WILLIAM R. MASON AND JOSEPH VANDERWEIDE. | 2075. Indictment for conspiracy. |

At this day comes Thomas Ward, junior, esquire, district attorney, and Sylvester R. Rush, esquire, special assistant to the Attorney-General, who prosecute the pleas of the United States in this behalf, and the defendants by John M. Waldron, esquire, N. Walter Dixon, esquire, and Reese McCloskey, esquire, their attorneys, also come;

And the joint and several demurrer of the defendants to the indictment herein, and the special pleas in bar of the defendants herein, and the demurrer of the United States to the special pleas in bar herein, coming on now to be heard are argued by counsel to the hour of adjournment.

Thirty-third day, May term. Thursday, July 16th, A. D. 1908.

Present: The Honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of May, A. D. 1908.

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| THE UNITED STATES OF AMERICA<br>*vs.*<br>WILLIAM R. MASON AND JOSEPH VANDERWEIDE. | 2075. Indictment for conspiracy. |

117 At this day comes Thomas Ward, junior, esquire, district attorney, and Sylvester R. Rush, esquire, special assistant to the Attorney-General, who prosecuted the pleas of the United States in this behalf, and the defendants by John M. Waldron, esquire; N. Walter Dixon, esquire, and Reese McCloskey, esquire, their attorneys, also come:

And the joint and several demurrer of the defendants to the indictment herein, and the special pleas in bar of the defendants herein, and the demurrer of the United States to the special pleas in bar herein, coming on now to be heard, are argued by counsel and by the court taken under advisement.

Sixty-sixth day, May term. Monday, November 2nd, A. D. 1908.

Present: The Honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of May, A. D. 1908.

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| THE UNITED STATES OF AMERICA<br>*vs.*<br>WILLIAM R. MASON ET AL. | 2075. Indictment for conspiracy. |

At this day it is ordered by the court that this case be, and the same is hereby continued to the next term of the court.

First day, November term. Tuesday, November 3rd, A. D. 1908.

November term, A. D. 1908.

Pleas in the District Court of the United States for the district of Colorado, at a term thereof begun and held at the
118 United States court-house in the city and county of Denver, on the first Tuesday (it being the third day) of November, A. D. 1908.

Present: The Honorable Robert E. Lewis, district judge; Thomas Ward, junior, esquire, district attorney; Dewey C. Bailey, esquire, marshal; Charles W. Bishop, esquire, clerk.

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| THE UNITED STATES OF AMERICA<br>*vs.*<br>WILLIAM R. MASON AND JOSEPH VANDERWEIDE. | 2075. Indictment for conspiracy. |

The joint and several demurrer to the indictment herein and the demurrer to the special pleas in bar of the defendants herein having

heretofore come on to be heard, and having been argued by Sylvester R. Rush, esquire, assistant to the Attorney-General, and Thomas Ward, junior, esquire, assistant attorney, who prosecutes the pleas of the United States in this behalf, and by John M. Waldron, esquire, attorney for the defendants, and having been taken under advisement, and the court having considered the same and being now fully advised in the premises;

It seemeth to the court now here that the indictment herein is sufficient in law to be answered unto, and that the special pleas in bar of the defendants herein are sufficient in law to be replied
119 unto, and so the said demurrer to the indictment herein, and to each and every count thereof, is hereby overruled; and the demurrer to the special pleas in bar to each and every count of the indictment herein is hereby overruled.

Eleventh day, November term. Monday, November 16th, A. D. 1908.

Present: The Honorable Robert E. Lewis, district judge, and other officers as noted on the third day of November, A. D. 1908.

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| THE UNITED STATES OF AMERICA<br>*vs.*<br>WILLIAM R. MASON AND JOSEPH VANDERWEIDE. | 2075. Indictment for conspiracy. |

At this day comes Thomas Ward, junior, esquire, district attorney, who prosecutes the pleas of the United States in this behalf, and the defendants by John M. Waldron, esquire, their attorney, also come. And thereupon, the district attorney saith that he will and doth hereby elect to stand upon his demurrer to the special pleas in bar to the charge of murder set out in the indictment herein, and each thereof, and declines to plead further.

Wherefore, it is considered by the court that the special plea in bar of the defendants to that particular part or portion of the first count of said indictment which charges these defendants with the vio-
lation of section 5509, United States Revised Statutes, in the
120 matter of the alleged murder of Joseph A. Walker mentioned in the said first count, be, and the same is hereby, sustained; that that particular portion of the first count of the indictment mentioned be, and the same is hereby, quashed; and that the said defendants William R. Mason and Joseph Vanderweide be, and each of them are, hereby discharged from so much of the premises in the indictment specified as relates to and concerns the said charge of the crime of murder.

It is further considered by the court that the special plea in bar of the defendants to that particular part or portion of the second count of said indictment which charges these defendants with the violation of section 5509, United States Revised Statutes, in the matter of the alleged murder of Joseph A. Walker mentioned in the said second

count, be, and the same is hereby, sustained: that that particular portion of the second count of the indictment mentioned be, and the same is hereby, quashed; and that the said defendants William R. Mason and Joseph Vanderweide be, and each of them are hereby, discharged from so much of the premises in the indictment specified as relates to and concerns the said charge of the crime of murder.

It is further considered by the court that the special plea in bar of the defendants to that particular part or portion of the third
121 count of said indictment which charges these defendants with the violation of section 5509, United States Revised Statutes, in the matter of the alleged murder of Joseph A. Walker mentioned in the said third count, be, and the same is hereby, sustained; that that particular portion of the third count of the indictment mentioned be, and the same is hereby, quashed; and that the said defendants William R. Mason and Joseph Vanderweide be, and each of them are hereby, discharged from so much of the premises in the indictment specified as relates to and concerns the said charge of the crime of murder.

UNITED STATES OF AMERICA,
*District of Colorado, ss:*

In the District Court of the United States within and for the District of Colorado.

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| THE UNITED STATES OF AMERICA, PLAINTIFF, *v.* WILLIAM R. MASON AND JOSEPH VANDERWEIDE, defendants. | No. 2075. |

*Plaintiff's bill of exceptions.*

Be it remembered, that on the 14th day of May, A. D. 1908, the following stipulation, signed by the attorneys for the respective parties hereto, was filed in said court, which said stipulation is in words and figures as follows, to wit:

122 In the District Court of the United States for the District of Colorado, sitting at Denver.

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| THE UNITED STATES OF AMERICA, *vs.* WILLIAM R. MASON AND JOSEPH VANDERWEIDE. | No. 2075. Indictment for conspiracy, in violation of sections 5508 and 5509, R. S. U. S. |

*Stipulation.*

It is now here mutually stipulated, in open court, by and between the United States, as plaintiff in the above entitled cause and pro-

ceeding, represented by its district attorney, Thomas Ward, jr., and the defendants, by their attorney, John M. Waldron, that the said defendants may file a demurrer to the said indictment and each and every count thereof, and may, at the time of filing the said demurrer, also file a plea in bar, in the nature of a plea of former acquittal, to so much and that part of each and every count in said indictment as charges the defendants with the crime of having killed and murdered the deceased, mentioned in said indictment, said charge of murder being based upon section 5209, United States Revised Statutes, and that the filing of said demurrer shall be without prejudice, in any respect, to the said plea, and likewise the said plea shall be without prejudice, in any respect, to the said demurrer.

And the said defendants shall have to and including May 28th, 1908, within which to file said demurrer and plea.

It is further stipulated that the said United States shall have ten days from and after the filing of said plea and demurrer within which to plead or demur to said special plea, as aforesaid; and the defendants' said demurrer to the said indictment, and the demurrer or other pleading of said United States to the said plea and pleas in bar, may be heard, argued together, and submitted at one and the same time.

THOMAS WARD, JR.,
*United States District Attorney.*
JNO. M. WALDRON,
*Attorney for Defendants.*

123 And thereafterwards and on, to wit, the 28th day of May, A. D. 1908, the said defendants, by their attorney, John M. Waldron, esquire, filed, in pursuance of said stipulation hereinbefore set forth, a demurrer to the indictment, which said demurrer is set forth in full in the transcript of the record proper, and at the same time filed special pleas in bar to said indictment and each and every count thereof, which said pleas in bar are set forth in full in the record proper herein.

And thereafterwards and on the 8th day of June, A. D. 1908, the said The United States of America, by Thomas Ward, jr., United States attorney for the district of Colorado, filed a demurrer to the said special pleas in bar, which said demurrer is set forth at length in the record proper herein.

And thereafterwards and on the 14th, 15th, and 16th days of July, A. D. 1908, before the court, the Honorable Robert E. Lewis, district judge, presiding, and John M. Waldron, esquire, appearing as counsel for the defendants, and S. R. Rush, special assistant to the Attorney-General, and Thomas Ward, jr., United States attorney for the district of Colorado, appearing on behalf of the United States, this cause came on to be heard on the indictment and the demurrer thereto, and the special pleas in bar and the demurrer thereto, in pursuance of the stipulation therefore filed.

124 And thereafterwards and on the 3d day of November, 1908, the said court made its decision upon the said demurrers; and on said day overruled the demurrer to the indictment, filed by the said defendants; to which ruling of the court the defendants, by their counsel, then and there duly excepted.

And the said court, at said time, overruled the demurrer filed by the United States of America to the several special pleas in bar pleaded by the defendants; to which ruling of the court the United States of America, by its attorney, then and there duly excepted.

And thereafterwards and on, to wit, the 16th day of November, A. D. 1908, before the said court, the said defendants being represented by John M. Waldron, esquire, and the United States by Thomas Ward, jr., United States attorney for the district of Colorado, the said United States, by its attorney, elected to stand upon its demurrer to the special pleas in bar, and declined to plead further; and thereupon the said court, at said time, gave judgment upon the said special pleas in bar, that the special pleas in bar of the defendants to that particular part or portion of each count of said indictment which charged the defendants with violation of section 5509, United States Revised Statutes, in the matter of the alleged murder of Joseph A. Walker, mentioned in each count, were sustained;

125 and that particular portion of each count of said indictment mentioned was quashed; and that the said defendants William R. Mason and Joseph Vanderweide were thereby discharged from so much of the said charge in said indictment specified as related to or concerned the charge of murder. To which ruling of the court the United States of America, by its attorney, then and there duly excepted.

And now, forasmuch as the above and foregoing matters and things do not appear fully of record, the plaintiff tenders this its bill of exceptions by it reserved herein, and prays that the same may be signed and sealed by the judge of this court and made a part of the record in said cause, pursuant to the statute in such case made and provided; which is accordingly done on this 25th day of November, A. D. 1908.

ROBT. E. LEWIS, *Judge.*

The foregoing bill of exceptions is correct.

JNO. M. WALDRON, *Atty. for Defts.*

(Endorsed:) No. 2075. United States District Court, District of Colorado. The United States of America, plaintiff, v. William R. Mason and Joseph Vanderweide, defendants. Plaintiff's bill of exceptions. Filed Nov. 25, 1908. Charles W. Bishop, clerk. Thomas Ward, jr., U. S. attorney.

UNITED STATES OF AMERICA,
*District of Colorado, ss:*

126 In the District Court of the United States within and for the District of Colorado.

THE UNITED STATES OF AMERICA, PLAINTIFF,
*v.*
WILLIAM R. MASON AND JOSEPH VANDERWEIDE, defendants. } No. 2075.

*Petition for writ of error.*

And comes now the United States, plaintiff herein, and says that on the 16th day of November, 1908, this court made its decision sustaining the special pleas in bar of the defendants to each and every count of said indictment.

And that thereafter and on said day this court, pursuant to that decision, entered judgment herein in favor of the defendants and against this plaintiff, upon said special pleas in bar, in which judgment and decision certain errors were committed to the prejudice of this plaintiff, and of such a character as to entitle this plaintiff, under the law, to review the said judgment and decision in the Supreme Court of the United States by writ of error, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in his behalf out of the Supreme Court of the United States
127 for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court.

THOMAS WARD, JR.,
*United States Attorney for the District of Colorado.*

(Endorsed:) No. 2075. United States District Court, District of Colorado. The United States of America, plaintiff, v. William R. Mason and Joseph Vanderweide, defendants. Petition for writ of error. Filed Nov. 25, 1908. Charles W. Bishop, clerk. Thomas Ward, jr., U. S. attorney.

UNITED STATES OF AMERICA,
*District of Colorado, ss:*

In the District Court of the United States within and for the District of Colorado.

THE UNITED STATES OF AMERICA, PLAINTIFF,
*v.*
WILLIAM R. MASON AND JOSEPH VANDERWEIDE, defendants. } No. 2075.

*Assignment of errors.*

Comes now the United States of America, plaintiff in the above-entitled cause, and files this assignment of errors upon which it will

rely in the prosecution of the writ of error to be sued out by
128 it for review by the Supreme Court of the judgment heretofore entered by the District Court for the District of Colorado in the above-entitled cause, to wit:

First. The District Court for the District of Colorado erred in overruling the demurrer to the special pleas in bar filed by the defendants herein.

Second. The said court erred in sustaining the special pleas in bar filed by the defendants herein.

Third. The said court erred in quashing that portion of each and every count of the said indictment which charged the defendants with violation of section 5509, United States Revised Statutes, in the matter of the alleged murder of Joseph A. Walker.

Fourth. The said court erred in entering judgment discharging the said defendants William R. Mason and Joseph Vanderweide from so much of the charge contained in each count of the said indictment as related to or concerned the charge of murder.

Wherefore, the United States of America prays that the judgment of the District Court of the United States for the District of Colorado be reversed, and that the said District Court be directed to reinstate the said indictment and proceed with the trial of the cause.

THOMAS WARD, Jr.,
*United States Attorney for the District of Colorado.*

(Endorsed:) No. 2075. United States District Court, Dis-
129 trict of Colorado. The United States of America, plaintiff, v. William R. Mason and Joseph Vanderweide, defendants. Assignment of errors. Filed Nov. 25, 1908. Charles W. Bishop, clerk. Thomas Ward, jr., U. S. attorney.

Eighteenth day, November term. Wednesday, November 25th, A. D. 1908.

Present: The Honorable Robert E. Lewis, district judge, and other officers as noted on the third day of November, A. D. 1908.

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| THE UNITED STATES OF AMERICA<br>*vs.*<br>WILLIAM R. MASON AND JOSEPH VANDERWEIDE. | 2075. Indictment for conspiracy. |

Upon reading and filing the foregoing petition and the assignment of errors therein referred to, it is ordered that the petition be, and the same hereby is, allowed, and that a writ of error as therein prayed be issued by the clerk of the Circuit Court for this district, under the seal of such Circuit Court, pursuant to section 1004 of the Revised Statutes.

UNITED STATES OF AMERICA,
*District of Colorado, ss.*

In the District Court of the United States for the District of Colorado.

THE UNITED STATES OF AMERICA,
*versus*
WILLIAM R. MASON AND JOSEPH VANDERWEIDE. } No. 2075.

130 The clerk will issue a complete transcript of the record in the above-entitled cause, said transcript to contain indictment, demurrer to indictment, special pleas in bar, demurrer thereto, stipulation to file, hear, and argue demurrer to special pleas in bar, and demurrer to indictment, judgment ruling of court upon both of said demurrers, judgment of court on special pleas, all motions and all orders of court.

THOMAS WARD, JR.,
*Attorney for U. S.*

To CHARLES W. BISHOP, *Clerk.*
Denver, Colorado, Nov. 16, 1908.
(Endorsed:) No. 2075. United States District Court for the District of Colorado. The U. S. of America versus William R. Mason and Joseph Vanderweide. Præcipe for transcript of the record. Filed Nov. 16, 1908. Charles W. Bishop, clerk. Thomas Ward, jr., attorney for U. S.

131 *Writ of error, to* *Court, U. S., District of Colorado.*

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA,
*District of Colorado, ss.*

*The President of the United States to the judge of the District Court of the United States, for the District of Colorado, greeting:*

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, between the United States of America and William R. Mason and Joseph Vanderweide, a manifest error hath happened, to the great damage of the said the United States of America, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the twenty-fourth day of December, 1908, in the said Supreme Court, to be then and there held;

that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness, the Hon. Melville W. Fuller, Chief Justice of the United States, this 25th day of November, in the year of our Lord, one thousand nine hundred and eight, and the Independence of the United States the 133rd year.

[SEAL.] CHARLES W. BISHOP,
*Clerk U. S. Circuit Court,*
*District of Colorado.*

Nov. 25, 1908.
Allowed by ROBT. E. LEWIS,
*District Judge.*

132 *Return.*

THE UNITED STATES OF AMERICA,
*District of Colorado, ss.*

In obedience to the command of the within writ, I herewith transmit to the honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, together with all things concerning the same.

Witness my hand and the seal of said District Court, at Denver, in said district, this first day of December, 1908.

[SEAL.] CHARLES W. BISHOP, *Clerk.*
By , *Deputy Clerk.*

(Indorsed:) No. 2075. Supreme Court of the United States. The United States of America, plaintiff in error, vs. William R. Mason and Joseph Vanderweide. Writ of error to District Court, U. S. District of Colorado. Filed in District Court of the U. S. this 25th day of November, A. D. 1908. Charles W. Bishop, clerk. Thomas Ward, jr., district attorney, attorney for plaintiff in error.

133 UNITED STATES OF AMERICA, *ss:*

*To William R. Mason and Joseph Vanderweide, greeting:*

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the District Court of the United States for the District of Colorado, wherein the United States of America is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Robert E. Lewis, judge of the District Court of the United States for the District of Colorado and ex-officio

judge of the Circuit Court of the United States for the District of Colorado, at Denver, in said district, this twenty-fifth day of November, A. D. 1908.

ROBT. E. LEWIS,
*District Judge.*

134 UNITED STATES OF AMERICA,
*District of Colorado, ss:*

I hereby certify that I received the within citation on November 27th, 1908, and served the same as to the defendants, William R. Mason and Joseph Vanderweide, by delivering to and leaving with John M. Waldron, their attorney of record, a true copy of the within writ on November 27th, 1908, at Denver, Colorado.

Marshal's fees and costs: 2 services, $4.00.

L. C. BAILEY,
*United States Marshal.*
By WM. H. ROBINSON, JR.,
*Deputy.*

(Indorsed): No. 2075. U. S. District Court, District of Colorado. The United States of America vs. William R. Mason and Joseph Vanderweide. Citation, filed Dec. 1, 1908. Charles W. Bishop, clerk.

135 UNITED STATES OF AMERICA,
*District of Colorado, ss:*

I, Charles W. Bishop, clerk of the District Court of the United States for the District of Colorado, do hereby certify the above and foregoing pages numbered from one (1) to one hundred thirty (130), both inclusive, to be a true, perfect, and complete transcript and copy of the pleadings and other matters set forth in the praecipe filed herein, together with a true copy of such praecipe, and the bill of exceptions, petition for writ of error, and assignments of error, heretofore filed or entered of record in said court and in a case lately in said court pending between the United States of America and William R. Mason and Joseph Vanderweide, as fully and completely as the same still remain on file and of record in my office at Denver.

In testimony to the above I do hereunto sign my name and affix the seal of said court at the city and county of Denver, in said district, this first day of December, A. D. 1908.

[SEAL.] CHARLES W. BISHOP, *Clerk.*

(Indorsement on cover:) File No. 21438, Colorado D. C. U. S. Term No. 642. The United States, plaintiff in error, vs. William R. Mason and Joseph Vanderweide. Filed December 11th, 1908. File No. 21438. Office of the clerk Supreme Court U. S. Received Dec. 7, 1908.

O

No. 942

# In the Supreme Court of the United States

October Term, 1916

THE UNITED STATES, PLAINTIFF IN ERROR,

v.

WILLIAM A. MASON AND JOSEPH VANDERVORT.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

BRIEF OF COUNSEL FOR THE UNITED STATES.

# In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES, PLAINTIFF IN error,
*v.*
WILLIAM R. MASON AND JOSEPH Vanderweide. } No. 642.

*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.*

## BRIEF ON BEHALF OF THE UNITED STATES.

### STATEMENT OF THE CASE.

The indictment against defendants contains three counts. In the first count they are charged with a conspiracy to injure, threaten, oppress, and intimidate Joseph A. Walker, John E. Chapson, Thomas J. Callaghan, and Thomas Harper, citizens of the United States, in the free exercise and enjoyment of a right and privilege secured to them by the Constitution and laws of the United States, to wit: The privilege, as special agents and employees of the Department of Justice of the United States, and as citizens and agents of the United States, to investigate and report all violations of the laws of the United

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States in the matter of the fraudulent and unlawful entry of public coal lands and other public lands of the United States within the district of Colorado.

In the second count it is charged that they conspired to injure, oppress, threaten, and intimidate Joseph A. Walker and others, because they, the said Walker and others, *had theretofore* exercised the right and privilege described in the first count; and

In the third count they are charged with the same offense as in the first count, except in addition to the right and privilege described therein it is further alleged that it was a right and privilege secured to said Walker and others as citizens of the United States, by the Constitution and laws of the United States, to accept public employment and to enter the service of the United States as such officers, agents, and employees, and to engage in the administration of the functions of said public offices, and while so exercising the said functions to be secure in their persons from bodily harm, injury, assault, and cruelties.

In each of the counts it is alleged as an aggravation of the offense, that in pursuance of the conspiracy described, defendants unlawfully, wilfully, purposely, feloniously, and maliciously killed the said Joseph A. Walker, and thereby committed murder, and that they injured, threatened, oppressed, and imprisoned said Chapson, Callaghan, and Harper, who had descended into the Hesperus coal mine, by untying the rope by which they had made the descent, and dropping the same to the bottom of the air shaft, and

closing up the only tunnel leading into said mine, and stationing certain persons armed with shotguns and revolvers at the mouth of said tunnel. (Rec., pp. 1–10.)

To the several counts of this indictment defendants filed a demurrer (Rec., pp. 12–18), and to that portion of each count wherein it is alleged that they were charged with the murder of said Joseph A. Walker, they filed a special plea in bar, in which they fully describe certain proceedings theretofore had in one of the district courts of the State of Colorado, wherein they were regularly prosecuted in accordance with the laws of that State on a charge of the murder of said Walker, and were by a jury acquitted of said offense, and were discharged by the court. (Rec., pp. 19–22 and 53–61.) A complete record of the proceedings in the state court were filed as a part of the plea. (Rec., pp. 22–52.)

To this special plea a demurrer was filed by the United States, upon the ground that it was—

> not sufficient in law to bar or preclude the United States of America from prosecuting the said indictment against the said William R. Mason and Joseph Vanderweide as to the charge of murder contained in said indictment and each count thereof. (Rec., p. 61.)

The court overruled both the demurrer of the defendants to the indictment and the demurrer of the United States to the special pleas in bar, and the United States district attorney, electing to stand upon his demurrer to the special pleas and declin-

ing to plead further, said special pleas were sustained, and that portion of each count of the indictment which charged defendants with the murder of Joseph A. Walker was stricken out. (Rec., pp. 64 and 65.)

The United States thereupon assigned errors and removed the case to this court by writ of error, under the act of March 2, 1907, entitled "An act providing for writs of error in certain instances in criminal cases."

I.

**This case falls within that clause of the act of March 2, 1907, which provides, "that a writ of error may be taken by and on behalf of the United States from the district or circuit courts direct to the Supreme Court of the United States, in all criminal cases * * * to wit: * * * from the decision or judgment sustaining a special plea in bar when the defendant has not been put in jeopardy."**

The act in its entirety reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That a writ of error may be taken by and on behalf of the United States from the District or Circuit Courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:
>
> From a decision or judgment quashing, setting aside, or sustaining a demurrer to any indictment, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.

From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

The writ of error in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases.

Pending the prosecution and determination of the writ of error in the foregoing instances, the defendant shall be admitted to bail on his own recognizance: *Provided*, That no writ of error shall be taken or allowed the United States in any case where there has been a verdict in favor of the defendant. (34 Stat., 1246.)

It is insisted on behalf of defendants that this case does not fall within the provisions of this act, because the special plea in bar sustained by the court does not involve the construction or validity of a statute.

The statute can not admit of any such meaning. In the first class of cases enumerated, to wit, those in which an indictment has been quashed, set aside, or a demurrer thereto sustained, there is an express limitation that such action must have been based upon the invalidity or construction of a statute. There is likewise the same limitation with reference to the second class of cases, to wit, where there has been an

arrest of judgment of conviction on account of the insufficiency of the indictment. But, as to the third class, the one within which this case falls, this limitation is omitted, the only one imposed being that the defendant shall not have been put in jeopardy.

If this limitation had not been expressed in connection with the first two classes, it would be absurd to insist that any such restrictions should be read into the third class; and yet the fact that it is here omitted after it had been expressed in connection with the other two, shows more conclusively that it was not intended to apply to this class than if it had not been expressed at all.

It is suggested that the provision in this clause, "When the defendant has not been put in jeopardy," excludes this case from the third class, as defendants had previously been tried in the state court of Colorado; but, of course, this expression refers to a trial of the present case, and limits the right to remove to this court to judgments against the Government on special pleas in bar, the validity of which depends upon a question of law, and which can be disposed of without the defendants being put upon trial.

## II.

**The only questions before this court are those which involve the sufficiency of defendants' special plea in bar.**

Counsel for defendants discuss in their brief at great length the questions which were raised in the court below by the demurrer to the indictment and were there disposed of in favor of the Government.

We shall not enter into a discussion of those questions, because they are not before this court. The case is here only upon a writ of error sued out by the plaintiff, and, furthermore, there is no statute permitting defendants to bring to this court for review at the present stage of the proceedings the judgment of the court below on the demurrer to the indictment.

The scope of the inquiry by this court in a case brought before it by the United States under the act of March 2, 1907, was settled by this court in *United States* v. *Keitel*, No. 286 on the docket of the present term, decided December 14, 1908, wherein the court, speaking through Mr. Justice White, said:

> The right of the United States to come directly to this court because of the construction of the statutes by the court below, as we have previously said in considering the question of jurisdiction, is solely derived from the act of 1907. * * * That act, we think, plainly shows that in giving to the United States the right to invoke the authority of this court by direct writ of error in the cases for which it provides contemplates vesting this court with jurisdiction only to review the particular question decided by the court below for which the statute provides. In other words, that the purpose of the statute was to give the United States the right to seek a review of decisions of the lower court concerning the subjects embraced within the clauses of the statute, and not to open here the whole case. We think this conclusion arises not only because the giving of the exceptional right to review

> in favor of the United States is limited by the very terms of the statute to authority to re-examine the particular decisions which the statute embraces, but also because of the whole context, which clearly indicates that the purpose was to confine the right given to a review of the decisions enumerated in the statute, leaving all other questions to be controlled by the general mode of procedure governing the same.

III.

Those portions of the indictment wherein defendants are alleged to have murdered Joseph A. Walker, were inserted under section 5509, Revised Statutes, which provides:

> If in the act of violating any provision in either of the two preceding sections any other felony or misdemeanor be committed, the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor by the laws of the State in which the offense is committed.

In the case of *Rakes* v. *United States*, decided January 18, 1909, counsel for the defense attempted to question the constitutionality of this section; but the court, speaking through Mr. Chief Justice Fuller, said this question "was long since put at rest," citing *Motes* v. *United States* (178 U. S., 458); *Logan* v. *United States* (144 U. S., 263); and *In re Quarles* (158 U. S., 532).

The enactment of this section, therefore, fell within the powers delegated to the United States,

and it applies to every case that falls within its provisions, unless there is some constitutional inhibition which intervenes and prevents its application to some particular class of cases, of which this is one.

It does not appear in the judgment of the court upon what grounds the special pleas were sustained, but in an exhaustive brief and argument filed by counsel for defendants in the court below it was insisted that under the facts set forth in the special pleas the question whether or not defendants murdered Joseph A. Walker could not be inquired into in this case, on account of the following constitutional provisions, to wit:

1. The last clause of the Seventh Amendment, which reads:

> No fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law.

2. That clause of the Fifth Amendment, which reads:

> Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

We will consider these provisions in the order mentioned.

FIRST.

**The Seventh Amendment has no application to this case.**

Counsel make two contentions with reference to this amendment, which are (1) that to consider on the trial of this case the offense of murder as set out in the

indictment would be a reexamination of facts once tried by a jury, within the meaning of the amendment, and (2) that the common law referred to in this amendment denies to the courts the right to retry defendants upon the charge of murder.

Neither of these contentions, we insist, is well taken, for the following reasons:

1. *The determination by the jury on the trial of this case, whether defendants murdered Joseph A. Walker, would not be a reexamination of the fact tried by a jury by a court of the United States within the meaning of this amendment.*

It is manifest from the language of this amendment that it had reference only to a review of a case on appeal, and prohibited an appellate court from reviewing the facts submitted to and passed upon by a jury in the court below, otherwise than according to the rules of the common law. Defendants rely for authority principally upon the case of *The Justices* v. *Murray* (9 Wall., 274), but we submit that this case conclusively supports the above interpretation of the amendment. The facts in that case were that one Patrie had brought suit for assault and battery against Murray and Buckley in the Supreme Court of the Third District of New York. The defendants pleaded specially that Murray was a United States Marshal for the Southern District of New York, and that Buckley was his deputy, and that the acts complained of were lawfully committed by them while performing the duties of their offices by order of the President. The case was tried in the state court, no

evidence being given on the trial to support this special defense, and verdict was rendered for the plaintiff and judgment regularly entered thereon. Subsequently, a writ of error was issued to the said Supreme Court to remove the case to the Circuit Court of the United States for the Southern District of New York, under the act of Congress of March 3, 1863, which provided in substance that if an action should be brought against a United States officer for acts committed by him during the rebellion, while acting under the orders of the President of the United States, he might, within six months after the rendition of the judgment, by writ of error or other process, remove the same to the Circuit Court of the United States, which court might try the case the same as if it had been there originally commenced. It was insisted on behalf of the petitioners for removal that the first ten amendments to the Constitution were limitations upon the power of the Federal Government and not upon the States, and in determining this question the court said:

> They (former decisions) have no pertinent, much less authoritative, application to the question in hand. That question is not whether the limitation in the amendment has any effect as to the powers of an appellate state court, but what is its effect upon the powers of the federal appellate court? Is the limitation confined to cases of writs of error to the inferior federal courts, or does it not also apply to writs of error to state courts in cases involving federal questions?

The latter is the precise question for our determination. Now, it will be admitted that the amendment, in terms, makes no such discrimination. They are: "And no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law." It is admitted that the clause applies to the appellate powers of the Supreme Court of the United States in all common-law cases coming up from an inferior federal court, and also to the Circuit Court in like cases, in the exercise of its appellate powers. And why not, as it respects the exercise of these powers in cases of federal cognizance coming up from a state court? The terms of the amendment are general, and contain no qualification in respect to the restriction upon the appellate jurisdiction of the courts except as to the class of cases, namely, suits at common law, where the trial has been by jury. The natural inference is that no other was intended. Its language, upon any reasonable if not necessary interpretation, we think, applies to this entire class, no matter from what court the case comes, of which cognizance can be taken by the appellate court.

It seems to us, also, that cases of federal cognizance, coming up from state courts, are not only within the words, but are also within the reason and policy of the amendment. They are cases involving questions arising under the Constitution, the laws of the United States, and treaties, or under some other fed-

eral authority, and, therefore, are as completely within the exercise of the judicial power of the United States, as much so as if the cases had been originally brought in some inferior federal court. *No other cases tried in the state courts can be brought under the appellate jurisdiction of this court or any inferior federal court on which appellate jurisdiction may have been conferred. The case must be one involving some federal question, and it is difficult to perceive any sensible reason for the distinction that is attempted to be made between the reexamination by the appellate court of a case coming up from an inferior federal, and one of the class above mentioned coming up from a state court. In both instances the cases are to be disposed of by the same system of laws and by the same judicial tribunal* (pp. 278, 279).

* * * * *

The reasons, therefore, for the application of this clause of the seventh amendment to cases coming up for review from the state courts were as strong as in cases from the inferior federal courts, and the history of the amendment will show that it was the apprehension and alarm in respect to the appellate jurisdiction of this court over cases tried by a jury in the state courts that led mainly to its adoption (pp. 280, 281).

* * * * *

Now, it is quite clear that the restrictions upon this appellate power by Congress, pointed out by Mr. Hamilton for the purpose of quieting the public mind, had a direct reference to the revision of the judgments of the state

> courts as well as the inferior federal, and what is significant on the subject is that the amendment submitted in the first session of Congress by Mr. Madison adopts the restriction suggested by Hamilton, and almost in the same words. We will simply add, there is nothing in the history of the amendment indicating that it was intended to be confined to cases coming up for revision from the inferior federal courts, but much is there found to the contrary (pp. 281, 282).

It therefore appears that the exact points decided by the court were (1) that this clause of the amendment is a restraint only upon the action of a United States court, but (2) it may be invoked in any case in which a United States court undertakes to review a question of fact tried by a jury, *wherein a federal question appears*, whether such trial be had in an inferior United States court or in a state court; and, therefore (3) that no case *which involves a federal question* and in which a question of fact has been tried and determined by a jury in a state court can be removed after judgment to a federal court, and such question of fact be therein reexamined.

This decision has been cited and applied by this court in *McKee* v. *Rains* (10 Wall., 25), wherein a removal was refused after trial and verdict in a state court; and in *Stevenson* v. *Williams* (19 Wall., 576), wherein it was held that a case is not removable after an appeal has been taken from final judgment of the court of original jurisdiction to the supreme court of the State; and in *Chicago, etc., Railroad* v. *Chicago* (166

U. S., 243), in which the court refused to reexamine findings of fact erroneously made by the jury in condemnation proceedings in the state court.

But there is no case in which it has been intimated that this amendment has any other meaning or imposed any further restrictions than those indicated in *The Justices* v. *Murray*.

Counsel also cite *United States* v. *Gilbert* (Fed. Cases, vol. 25, pp. 1287–1302), in which Justice Story cited this provision in disallowing a motion for retrial in a criminal case in support of his holding that he was without authority as a presiding judge to review the evidence and grant a new trial; and the case has no bearing whatever upon the question here before the court.

*Ex parte Lange* (18 Wall., 163, 170) is also cited, but the facts in that case were that a verdict of guilty having been found by the jury, the court imposed a double punishment, that is, he had both assessed a fine and imposed an imprisonment, when the statute authorized the imposition of a fine *or* an imprisonment. The defendant paid the fine and sued out a writ of *habeas corpus* seeking relief from the imprisonment; and this amendment was incidentally cited by this court to show that some of the principles of the common law with reference to the trial of cases and double punishment had been embodied in the Constitution.

The present case does not admit of an application of the rule applied in *The Justices* v. *Murray*. This case is not here on removal from a state court,

and there has heretofore been no question of fact tried in these proceedings by a jury in any court; and manifestly, if there is any protection to defendants against the consideration of the question of whether or not the killing of Joseph A. Walker was murder, it must be upon the principle that a defendant can not be twice tried for the same offense, and this question will arise in the consideration of the other constitutional provision relied upon by defendants.

2. *The Seventh Amendment does not authorize the application of the common-law rule that a defendant can not be more than once tried upon the same charge.*

The language of the amendment in providing that no fact tried by a jury shall be *reexamined* otherwise than according to the rules of the common law excludes the idea that the principles of the common law must control all the proceedings in the case. It certainly was not intended by this provision to incorporate into the Constitution and laws of the United States all the common-law rules relating to the original trial of criminal cases in the United States courts.

Counsel cite no authorities to support any such contention, and we know of none. It was early held that—

> There can be no common law of the United States. The Federal Government is composed of twenty-four sovereign and independent States, each of which may have its local usages, customs, and common law. There is no principle which pervades the Union and has the authority of law that is not embodied in the

> Constitution or laws of the Union. The common law could be made a part of our federal system only by legislative adoption. (*Wheaton* v. *Peters*, 8 Pet., 590, 657.)

And this principle has been adhered to ever since.

SECOND.

**The state of facts presented in the special pleas does not bring the case within that clause of the Fifth Amendment which provides that "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."**

On account of the earnestness with which this question was pressed in the court below, and the fact that the court was induced to entertain defendants' contention, we will review the authorities relating thereto, and especially the decisions of this court, more fully than we otherwise would.

There are three reasons why the special pleas can not be sustained under this constitutional provision, to wit:

1. *This provision applies only to proceedings in United States courts.*

In *Barron* v. *Baltimore* (7 Pet., 242, 246) the question presented was whether that part of the Fifth Amendment which provides "Nor shall private property be taken for public use without just compensation" was applicable to state action. In determining this question in the negative, the court, speaking through Chief Justice Marshall, said:

> The plaintiff in error contends that it comes within that clause in the fifth amendment to

the Constitution, which inhibits the taking of private property for public use, without just compensation. He insists that this amendment being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a State, as well as that of the United States. If this proposition be untrue, the court can take no jurisdiction of the cause.

The question thus presented is, we think, of great importance, but not of much difficulty. The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government, as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this Government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and we think, necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.

If these propositions be correct, the fifth amendment must be understood as restraining the power of the General Government, not as

> applicable to the States. In their several constitutions they have imposed such restrictions in their respective governments as their own wisdom suggested; such as they have deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no further than they are supposed to have a common interest.

This case has been repeatedly followed by this court; and it is settled in a long line of cases that the first ten Articles of Amendment were intended to operate on the National Government alone.

*Livingston* v. *Moore*, 7 Pet., 468, 551.
*Fox* v. *Ohio*, 5 How., 410, 434.
*Smith* v. *Maryland*, 18 How., 71, 76.
*Withers* v. *Buckley*, 20 How., 84, 91.
*Pervear* v. *The Commonwealth*, 5 Wall., 475, 479.
*Twitchell* v. *The Commonwealth*, 7 Wall., 321, 325.
*The Justices* v. *Murray*, 9 Wall., 274, 278.
*Edwards* v. *Elliott*, 21 Wall., 532, 557.
*Walker* v. *Sauvinet*, 92 U. S., 90, 92.
*United States* v. *Cruikshank*, 92 U. S., 542, 552.
*Pearson* v. *Yewdall*, 95 U. S., 294, 296.
*Davidson* v. *New Orleans*, 96 U. S., 97, 101.
*Kelly* v. *Pittsburg*, 104 U. S., 78, 79.
*Presser* v. *Illinois*, 116 U. S., 252, 265.
*Spies* v. *Illinois*, 123 U. S., 131, 166.
*Brown* v. *New Jersey*, 175 U. S., 162, 174.
*Barrington* v. *Missouri*, 205 U. S., 486.
*Hunter* v. *Pittsburg*, 207 U. S., 176.

It may be insisted, however, that inasmuch as this case is pending in a United States court it is therefore subject, even under the foregoing authorities, to the limitations imposed by this amendment. But the provision does not apply because the pleas do not set up *a former jeopardy within the meaning of the Constitution*. The language of Chief Justice Marshall above quoted clearly shows that the legislative and judicial acts of the state governments are entirely distinct from and without any connection with similar acts of the National Government, and that this amendment was not intended to apply or give any recognition to any proceeding in a state court. In *Fox* v. *Ohio*, *supra*, it was held that if the United States should punish a defendant for a violation of an act of Congress, such person would not be protected from punishment for the same acts by a state court under an act of its legislature declaring such acts an offense against the State. It necessarily follows as a corollary to this principle that punishment, and much less an acquittal, by a state court can not bar a second criminal prosecution for the same acts under a proper statute in the United States courts. When the first prosecution is in the federal court, the second one in the state court is not barred, because it—the state prosecution—is not a jeopardy within the amendment. But if such second trial is not a jeopardy because it is in a state court, then neither can the first trial constitute a jeopardy when it is in a state court. The order in which the trials are had can make no difference.

In *United States* v. *Barnhart* (22 Fed., 285, 290), in following this principle, the learned judge, in holding that an acquittal for murder in a state court in Oregon was not a bar to a prosecution for murdering an Indian under an act of Congress, said:

> This inhibition is a limitation upon the power of the Government of the United States, and not that of the State, and its only effect is to restrain the former from putting any person in jeopardy twice for the same offense; that is, an offense defined by its laws and triable in its courts. *It matters not how often a person has been put in jeopardy elsewhere or otherwise on account of the act or conduct constituting such crime; it is no defense to a prosecution, therefore, in the courts of the United States.*

In 12 Cyc. Law and Pro., 259, it is said:

> The provision in the Federal Constitution to this effect is applicable only to crimes against and trials under federal laws, and not to prosecutions by the States.

The only case that can be construed into an exception to the rule followed in the numerous authorities above cited, that the first ten amendments apply only to the United States, is that of *The Justices* v. *Murray*, *supra*, wherein it was held that the portion of the Seventh Amendment which provides that, "No fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law," applied to cases tried in a state court which involved a federal question and which had been removed to a federal

court for further proceedings in the same action. But this case is in fact an authority for our contention, inasmuch as it was rested *solely on the presence of the federal question.*

2. *The same acts may constitute an offense against both the national and state governments, and the trial of one offense is not a bar to the trial of the other.*

We will first consider the numerous decisions of this court in which this question has been considered.

In *Fox* v. *Ohio* (5 How., 410, 434), the plaintiff in error, Malinda Fox, had been convicted in the state court of Ohio for passing and uttering counterfeit coin, and the judgment pronounced thereon had been affirmed by the supreme court of that state, and it was insisted in this court that the state court had no jurisdiction of the offense, but that the jurisdiction belonged exclusively to the courts of the United States. It was held that, under the Constitution of the United States, the United States courts had not absorbed the entire juisdiction of the subject-matter, and that the state had the right to inflict punishment for the cheat in passing counterfeit coin. In commenting upon the question involved in the present case, the court said:

> Conceding for the present that Congress should undertake, and could rightfully undertake, to punish a cheat perpetrated between citizens of a State, because an instrument in effecting that cheat was a counterfeited coin of the United States, the force of the objection sought to be deduced from the position assumed

is not perceived; for the position itself is without real foundation. The prohibition alluded to as contained in the amendments to the Constitution, as well as others, with which it is associated in those articles, were not designed as limits upon the state governments in reference to their own citizens. They are exclusively restrictions upon federal power intended to prevent interference with the rights of the States and of their citizens. Such has been the interpretation given to those amendments by this court in the case of *Barron* v. *The Mayor and City Council of Baltimore* (7 Pet., 243), and such, indeed, is the only rational and intelligible interpretation which those amendments can bear, since it is neither probable nor credible that the States should have anxiously insisted to ingraft upon the Federal Constitution restrictions upon their own authority—restrictions which some of the States regarded as the *sine qua non* of its adoption by them. It is almost certain that, in the benignant spirit in which the institutions both of the state and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless, indeed, this might occur in instances of peculiar enormity or where the public safety demanded extraordinary rigor; but were a contrary course of policy and action either probable or usual this would by no means justify the conclusion that offenses falling within the competency of different authorities to restrain or punish them would

> not properly be subjected to the consequences which those authorities might ordain and affix to their perpetration.

In *United States* v. *Marigold* (9 How., 559, 569) it was held that, under the commerce clause of the Constitution, Congress had the power to pass an act providing for the punishment of persons who should bring into the United States, with intent to pass, any false, forged, or counterfeit coin, and also all persons who should pass such coin; and in considering the question whether or not such power was in conflict with the power of the States to punish for the same offense, the court said:

> With the view of avoiding conflict between the state and federal jurisdictions, this court in the case of *Fox* v. *The State of Ohio* have taken care to point out that the same act might, as to its character and tendencies and the consequences it involved, constitute an offense against both the state and federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each. We think this doctrine sound.

In *Moore* v. *People of Illinois* (14 How., 13, 19) the plaintiff in error had been indicted and convicted in the state court of Illinois for harboring and secreting a negro slave, and the case was removed from the Supreme Court of Illinois to this court to have determined the question whether the Illinois act was void under that provision of the Constitution of the United

States which required the return of fugitive slaves and the act of Congress passed in pursuance thereof. The court pointed out a number of differences between the provisions of the act of Congress and those of the Illinois act; but in response to the insistence that to uphold the validity of the Illinois act would subject a person harboring a slave to two prosecutions, the court said:

> But, admitting that the plaintiff in error may be liable to an action under the act of Congress for the same acts of harboring and preventing the owner from retaking his slave, it does not follow that he would be twice punished for the same offense. An offense, in its legal signification, means a transgression of the law. A man may be compelled to make reparation in damages to the injured party and be liable also to punishment for a breach of the public peace in consequence of the same act; and may be said, in common parlance, to be twice punished for the same offense. Every citizen of the United States is also a citizen of a State or Territory. He may be said to owe allegiance to two sovereigns and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. Thus an assault upon the marshal of the United States and hindering him in the execution of legal process is a high offense against the United States, for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the

> peace of the State, a riot, assault, or a murder, and subject the same person to a punishment under the state laws for a misdemeanor or felony. That either or both may (if they see fit) punish such an offender can not be doubted. Yet it can not be truly averred that the offender has been twice punished for the same offense, but only that by one act he has committed two offenses for each of which he is justly punishable.

It is insisted on behalf of defendants that this language of the court is *dictum*, but this contention is manifestly incorrect. The question of the validity of the Illinois act drew directly into question whether the prosecution of a person under the state act covering identically the same subject as an act of Congress would create a bar to a prosecution under the act of Congress. It is true that there were distinctions between the two acts, as pointed out by the court, but the court saw proper to base its decision upon two grounds, one being that the distinctions mentioned existed, and the other that even if they did not exist, yet the state act was valid, because the same acts committed by a person might constitute an offense against both the State and the National Government. It had as well be insisted that the portion of the opinion in which the court pointed out the distinction between the state and federal acts, and held that the state act for that reason was valid, was a *dictum*. When a court sees proper to rest its decision upon a number of grounds, its consideration of neither of such grounds is a *dictum*.

In *United States* v. *Cruikshank* (92 U. S., 542, 550) the court, in considering the relationship between the State and National Government, said:

> The people of the United States resident within any State are subject to two governments—one state and the other national; but there need be no conflict between the two. The powers which one possesses the other does not. They are established for different purposes and have separate jurisdictions. Together they make one whole and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad. True, it may sometimes happen that a person is amenable to both jurisdictions for one and the same act. Thus, if a marshal of the United States is unlawfully resisted while executing the process of the courts within the State, and the resistance is accompanied by an assault on the officer, the sovereignty of the United States is violated by the resistance, and that of the State by the breach of peace, in the assault. So, too, if one passes counterfeited coin of the United States within a State it may be an offense against the United States and the State; the United States because it discredits the coin, and the State because of the fraud upon him to whom it is passed. This does not, however, necessarily imply that the two governments possess powers in common or bring them into conflict with each other. It is the natural consequence of a citizenship which owes

> allegiance to two sovereignties and claims protection from both. The citizen can not complain, because he has voluntarily submitted himself to such a form of government. He owes allegiance to the two departments, so to speak, and within their respective spheres must pay the penalties which each exacts for disobedience to its laws. In return, he can demand protection from each within its own jurisdiction.

In *Coleman* v. *Tennessee* (97 U. S., 509, 518) the court held that where a soldier of the United States Army had been tried by military court-martial in Tennessee for murder, when that section of the State was under military jurisdiction, and had been convicted and sentenced to death, but sentence had not been executed, such conviction could be successfully pleaded as a bar to a prosecution subsequently instituted in the civil courts of the State; but that it might not be understood that the court intended to modify in the least the principles contained in the foregoing cases, it was said:

> In thus holding, we do not call in question the correctness of the general doctrine asserted by the supreme court of Tennessee that the same act may, in some instances, be an offense against two governments, and that the transgressor may be held liable to punishment by both when the punishment is of such a character that it can be twice inflicted, or by either of the two governments if the punishment, from its nature, can be only once suffered. It may well be that the satisfaction which the

> transgressor makes for the violated law of the United States is no atonement for the violated law of Tennessee.

In *Ex parte Siebold* (100 U. S., 371, 390), Siebold had been indicted and convicted in the United States Circuit Court for the district of Maryland for committing frauds as an officer of election at which a Representative in Congress had been voted for. The case was heard by this court on petition for writ of *habeas corpus*, and it was insisted on behalf of petitioners that inasmuch as the election was held under a state statute, and the petitioners were acting as state officials in holding the same, the state court alone had jurisdiction. The court, after reviewing the above authorities, added the following comment:

> We do not well see how the doctrine they contain can be controverted. A variety of instances may be readily suggested in which it would be necessary or proper to apply it. Suppose, for example, a state judge having power under the naturalization laws to admit aliens to citizenship should utter false certificates of naturalization, can it be doubted that he could be indicted under the act of Congress providing penalties for that offense, even though he might also, under the state laws, be indictable for forgery as well as liable to impeachment? So, if Congress, as it might, should pass a law fixing the standard of weights and measures, and imposing a penalty for sealing false weights and false measures, but leaving to the States the matter of inspecting and sealing those used by the people, would not an

> offender, filling the office of sealer under a state law, be amenable to the United States as well as to the State?

In *Cross* v. *North Carolina* (132 U. S., 131, 139) the court held that a State is not deprived of jurisdiction over a person who forges a note with intent to defraud, in violation of its statutes, by the fact that he followed this crime up by committing against the United States the further crime of making false entries in connection with such note on the books of a national bank, in violation of a statute of the United States; and, in the course of its opinion, said:

> The argument in behalf of the plaintiffs in error fails to give effect to the established doctrine that the same act or series of acts may constitute an offense equally against the United States and the State, subjecting the guilty party to punishment under the laws of each government.

In *Pettibone* v. *United States* (148 U. S., 197, 209), which involved a conspiracy to impede proceedings in a United States court, the court, referring to the question here under consideration, said:

> While offenses exclusively against the States are exclusively cognizable in the state courts, and offenses exclusively against the United States are exclusively cognizable in the federal courts, it is also settled that the same act or series of acts may constitute an offense equally against the United States and the State, subjecting the guilty party to punishment under the laws of each government.

In *Crossley* v. *California* (168 U. S., 640, 641), in which plaintiff in error had been sentenced to death for the murder of an engineer in wrecking the train under his control, and in which it was insisted that the jurisdiction to punish for the offense was in the United States courts alone, under the acts of Congress passed with reference to the obstruction of the transmission of the United States mail and interference with interstate commerce, the court said:

> But it is settled law that the same act may constitute an offense against the United States and against a State, subjecting the guilty party to punishment under the laws of each government, and may embrace two or more offenses.

In *Grafton* v. *United States* (206 U. S., 333, 353) it was held that the judgment of a court-martial having jurisdiction to try an officer or soldier for a crime committed in the Philippines is entitled to the same finality and conclusiveness as the judgment of a civil court within that jurisdiction, and consequently that a soldier having been acquitted of the crime of homicide alleged to have been committed by him in the Philippine Islands, by a military court-martial of competent jurisdiction, proceeding under the authority of the United States, could not be subsequently tried for the same offense in a civil court exercising authority in that territory. However, the language used by the court in the case of *Moore* v. *Illinois*, *supra*, was quoted with approval; but it was held that the principle had no application to the case under consideration,

because the government of the Philippines owes its existence wholly to the United States, and its judicial tribunals exert all their powers by authority of the United States, and the jurisdiction and authority of the United States over that territory and its inhabitants, for all legitimate purposes of government, is paramount.

The case of *Sexton* v. *California* (189 U. S., 319, 324) has also a very strong bearing upon this question. The plaintiff in error was indicted in a state court of California for extorting money from one Greenwald by threatening to accuse him of the crime of having, in violation of the laws of the United States, sold and delivered cigars in a form other than in a new box not before used for the purpose of packing cigars therein; when precisely the same acts were made a crime under a statute of the United States. Upon removal of the case to this court, it was insisted that, inasmuch as the offense of which plaintiff in error threatened to accuse said Greenwald was one solely against the United States, and as an extortion by making such threat was also a crime under the United States statutes, the state courts of California had no jurisdiction to punish plaintiff in error therefor. This court, however, held that by section 5328, Revised Statutes, to wit: "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof," it—

> was not intended to merely permit a state court to punish a different offense involved in the one act. *It was intended to leave with the*

*state court, unimpaired, the same jurisdiction over the act that it would have had if Congress had not passed an act on the subject;*

And, therefore, that both the state courts and the United States courts had the power to inflict punishment upon the plaintiff in error for the very same acts, they having been made a crime by both the state statute and by act of Congress.

It would appear from these numerous authorities that if there is any one principle which has been firmly and irrevocably fixed by this court, it is the principle that a person may be prosecuted in the United States courts for an offense created by act of Congress, although he may have been, or may thereafter be again, prosecuted for precisely the same acts when made an offense by a state statute.

Defendants, however, insist that the following decisions of this court maintain a contrary view, to wit:

*Houston* v. *Moore* (5 Wheat., 1), wherein it was held that a law of the State of Pennsylvania, which provided that privates of the militia of the State refusing to serve when called into actual service by the President should be liable to the penalties prescribed in a certain act of Congress, or any other act thereafter passed upon the subject, and provided for the trial of such delinquents by a state court-martial, was not repugnant to the Constitution of the United States, because the act of Congress upon that subject did not deprive the state legislature of creating a tribunal to enforce the provisions of said congressional act, and said state tribunal therefore exercised concurrent

jurisdiction with the tribunal provided for in the act of Congress. With reference to the effect of a judgment of either of these tribunals, it was said:

> It was contended that if the exercise of this jurisdiction be admitted, that the sentence of the court would either oust the jurisdiction of the United States court-martial, or might subject the accused to be twice tried for the same offense. To this I answer that, if the jurisdiction of the two courts be concurrent, the sentence of either court, either of conviction or acquittal, might be pleaded in bar of the prosecution before the other, as much so as the judgment of a state court, in a civil case of concurrent jurisdiction, may be pleaded in bar of an action for the same cause, instituted in a Circuit Court of the United States.

This case, manifestly, has no bearing upon the question here involved. The effect of the decision was that, inasmuch as Congress had undertaken to legislate fully upon the regulation of the state militia, the State of Pennsylvania had no power to enact further legislation with reference thereto; but because Congress had not deprived the State of the right *to create a tribunal to enforce the provisions of the congressional act*, a sentence of the state court-martial, which was pronounced under the act of Congress, was a valid judgment, and was a bar to any judgment that might be pronounced by a United States court-martial. There was only one offense created by the act of Congress, and that was an offense against the United States, and of

course a conviction of that offense would fall within the constitutional prohibition when a judgment with reference thereto had been pronounced in proper proceedings before a legally constituted tribunal.

In *United States* v. *The Pirates* (5 Wheat., 184, 196), it was held that piracy is an offense within the criminal jurisdiction of all nations, and a person committing the same may be prosecuted in the courts of any nation, and a conviction or acquittal in either of such courts is a bar to a prosecution in the courts of another nation. This principle arises out of the peculiar nature of the crime of piracy and the comity existing between nations, and has nothing whatever to do with the Fifth Amendment to the Constitution of the United States.

In 1 Bishop on Criminal Law (6 ed., sec. 983) it is said with reference to foreign jeopardy:

> It results from obvious principles that neither the common-law maxim nor our constitutional provision can span country and country, rendering a jeopardy in one country a bar to a trial in another. If such a rule prevails, it must proceed from international law, not from the written constitution of one country or the practice of the courts of another;

and it is in connection with this statement that the principle is laid down, in section 985 *id.*, that a conviction or acquittal of the crime of piracy in the court of one nation will be accepted as a bar to a prosecution for the same offense in the courts of another

nation, and which is relied upon as authority by defendants. Moreover, in considering the direct question here involved, this same author, in section 987, says:

> An act committed within the territorial limits of a State may be contrary to a statute of the United States and at the same time contrary to the law, statutory or common, of the State. And the question arises whether a prosecution under one of these governments will bar proceedings for the same act in the tribunals of the other. The question divides itself into two parts; first, whether if the laws so stand apparently, both are valid, or whether the power of the one government, which in the particular thing may be superior, supersedes that of the other. Secondly, assuming both laws to be valid, whether a prosecution in the courts of one of the governments bars a prosecution for the same act in those of the other.

And in considering the second proposition, the author quotes the language of Justice Grier in *Moore* v. *Illinois*, *supra*, and in section 989 adds:

> *While the law is plainly so, as to the right*, the greater number of our tribunals have manifested a disposition, in the absence of any express command of the legislature, to accept a prosecution in one of these jurisdictions as a ground for declining to institute a prosecution for the same wrongful act in another, or for suspending the prosecution if instituted, or for permitting the accused person to avail himself in some way of this matter.

> At the same time there is just weight in the consideration that if a man, though by one act, has violated the laws of two governmental powers, it is proper both should punish him.

Counsel for defendants also rely upon the statement in 1 Wharton Criminal Law (9 ed., sec. 293), that where a particular offense as an entirety is cognizable by two sovereigns, the first sovereign that takes possession of the defendant and undertakes the prosecution of the offense absorbs the case as a general rule, which action if *bona fide* and complete is a bar to the action of the other sovereign. But in Wharton's Crim. Plead. and Prac. (9 ed., sec. 442) this same author discusses this proposition in the following language:

> An offense, however, may have two aspects, so that one sovereign may punish it in the first aspect and another in the second. Thus, uttering of forged coin may be punished by a State as a cheat and by the Federal Government as forgery. In such cases it is argued by a late able federal judge (Grier, *J.*) that one judgment can not be pleaded in bar to the other. But this is to be taken subject to the qualifications hereinbefore expressed. If the charges be identical, then the court first seizing jurisdiction absorbs the offense. If, however, the offense is one capable of being broken into sections, or is in one sense aimed at one sovereign, in another sense against another sovereign, then each sovereign may independently prosecute for the ingredient or phase by which such sovereign is distinctly offended.

> In such case, however, the second prosecuting sovereign should only impose such a punishment as, with that already inflicted, would be an adequate penalty for the aggregate offense. If the punishment imposed by the sovereign first prosecuting be adequate, then the second should interpose a *nolle prosequi* or pardon. Supplementary *jurisdiction* is in such cases to be maintained, but cumulative punishment avoided by interposition of executive clemency. This is the course advised by the German jurists just quoted and is substantially approved by the late Chief Justice Taney.

The case here referred to, in which it is said that Chief Justice Taney approved the principle announced, is that of *United States* v. *Amy* (Fed. Cases 14445, vol. 24, pp. 792, 811), wherein it was said:

> From the nature of our Government the same act may be an offense against the laws of the United States and also of a State, and be punishable in both. This was considered and decided in the Supreme Court of the United States in the case of *Fox* v. *Ohio* (3 How., 443) and in the case of *United States* v. *Marigold* (9 How., 560), and the punishment in one sovereignty is no bar to his punishment in the other. Yet in all civilized countries it is recognized as a fundamental principle of justice that a man ought not to be punished twice for the same offense; *and if this party had been punished for the larceny in the state tribunal the court would have felt it to be its duty to suspend sentence and to represent the facts to the President, to give him an opportunity of ordering a nolle prosequi or granting a pardon.*

For the various federal and state cases in which the leading case of *Moore* v. *Illinois* (14 How., 13) has been cited and approved, see 5 Rose's Notes, page 213.

Counsel for defendants also cite *Ex parte Lange* (85 U. S., 163), wherein it was held that where a verdict of guilty by a jury had been rendered and both a fine and imprisonment had been imposed upon the defendant, when the act provided only for either a fine or an imprisonment as a punishment for the offense, and the defendant had paid the fine, the court could not subsequently resentence the defendant to imprisonment. This decision manifestly has no bearing upon the present case.

The principle that one can be twice punished for the same act is so well recognized that, notwithstanding this provision in the Fifth Amendment appears also in the constitutions of the various States, it has been almost universally held that the same act may constitute two offenses, one against a city ordinance and the other against a state statute, and a person charged therewith may be tried for both; and that a conviction or acquittal of either is no bar to a conviction of the other. (12 Cyc. Law and Pro., 288.) And certainly the relationship between a state government and a municipality, which is its creature, is much closer than that between the United States and the States.

We submit that counsel for defendants mistake the meaning of the word "concurrent" as used in some of the authorities cited by them in support of the proposition that the conviction or acquittal of a defendant by one court is a bar to his prosecution in

another court having "concurrent" jurisdiction of the same offense.

In these authorities, the word "concurrent" manifestly refers to courts which have equal rights to take jurisdiction of the same action or offense, as, for illustration, where two States are given concurrent jurisdiction over a body of water which constitutes a boundary between them, or in cases of piracy, or where a court of law and a court of equity have each jurisdiction to take cognizance of and determine a civil action. It is manifest that *in this sense* the federal courts and the state courts of Colorado can not exercise concurrent jurisdiction of the offense in question. The offense of murder is cognizable only in the state court, and the federal court can exercise no jurisdiction whatever over the same as a separate and distinct offense. On the other hand, the offense of conspiracy, for which defendants are indicted in this case, is cognizable only by the federal courts, and the state courts have no jurisdiction with reference thereto. Consequently, the authorities cited with reference to judgments of courts having *concurrent* jurisdiction have no application to this case.

The contention that an acquittal or a conviction in a state court of an offense growing out of certain acts may be pleaded in bar of an offense against the United States for the same acts is wholly inconsistent with the nature and powers of the National Government. In *McCulloch* v. *Maryland* (4 Wheat., 315, 426), the

court, speaking through Chief Justice Marshall, used the following language:

> There is no express provision for the case (that the United States Bank be exempted from the power of a State to tax its operations), but the claim has been sustained on a principle which so entirely pervades the Constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rending it into shreds. This great principle is that the Constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and can not be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, first, that a power to create implies a power to preserve; second, that a power to destroy, if wielded by a different hand, is hostile to and incompatible with these powers to create and preserve; third, that where this repugnancy exists that authority which is supreme must control, not yield to that over which it is supreme.

To the same effect it was said in *ex parte Siebold* (100 U. S., 371, 398):

> The doctrine laid down at the close of counsel's brief, that the state and national govern-

ments are coordinate and altogether equal, on which their whole argument, indeed, is based, is only partially true.

The true doctrine, as we conceive, is this, that whilst the States are really sovereign as to all matters which have not been granted to the jurisdiction and control of the United States, *the Constitution and constitutional laws of the latter are, as we have already said, the supreme law of the land; and when they conflict with the laws of the States, they are of paramount authority and obligation.* This is the fundamental principle on which the authority of the Constitution is based; and unless it be conceded in practice, as well as theory, the fabric of our institutions, as it was contemplated by its founders, can not stand. The questions involved have respect not more to the autonomy and existence of the States than to the continued existence of the United States as a government to which every American citizen may look for security and protection in every part of the land.

It is manifest, however, that if by proceedings in state courts authorized by state legislation one may be tried for committing certain acts, and such proceedings have the effect of depriving the National Government of the power to punish such person for the same acts when they constitute a crime against the United States, the National Government would not in that respect be a sovereign power, but would be subject to state action; and it would lie within the power of the States to nullify all criminal

proceedings against violators of the national laws for acts committed within their territory for which a prosecution might be had in the state courts. For illustration, by section 5398, Revised Statutes, it is made an offense to assault, beat, or wound a United States officer in executing a process. Such an assault is also an offense against the laws of all the States; but can it be said that one can escape punishment altogether for such an assault by being arrested, tried, and acquitted by a state court, and that such an acquittal would defeat the jurisdiction of the United States courts?

3. *The offense with which defendants are charged does not arise out of the same acts as, and is entirely different in its nature from, the offense for which they were tried in the state court.*

Defendants are not in this case indicted for the *murder* of Joseph A. Walker, but for a *conspiracy* to injure and intimidate and oppress said Walker and others in the exercise of certain privileges secured to them by the Constitution and laws of the United States. The *gravamen* of the offense here charged is the conspiracy. Section 5509, Revised Statutes, does not create a separate offense, but it only prescribes the punishment that may be inflicted in case it be determined by the jury that the aggravated conditions mentioned therein existed. The relationship between sections 5508 and 5509 and the purpose of the enactment of the latter section is thus stated by the Circuit Court of Appeals of the Sixth Circuit in *Davis* v. *United States* (107

Fed., 755), the latter part of which was quoted with approval by this court in the case of *Rakes* v. *United States*, No. 257 of the present term, decided January 18, 1909:

> Counsel for the plaintiff in error, who submits the case on a brief, alleges six grounds on which he contends for a reversal of the judgment, the first two of which may be considered together. They are: First, in the first place, we insist that the indictment does not charge the crime of conspiracy as such, but alleges the existence of the conspiracy for the sole purpose of giving the court jurisdiction of the crime of murder. Second, the crime of murder and the crime of conspiracy are two separate and distinct offenses, and the crime of murder does not include or embrace the crime of conspiracy, and the defendant can not be tried for two separate and distinct offenses at the same time.
>
> These contentions are based upon a misconstruction of the effect of sections 5508 and 5509. They do not contemplate two distinct offenses against the United States. Only the conspiracy is of federal cognizance, and it is that offense which is made punishable. If in the prosecution of it a thing is done which is a crime by the laws of the State, the conspiracy is punishable by a measure of punishment equal to that prescribed by the law of the State for such other crime. But it is an aggravation merely of the substantive offense of conspiracy. If the latter is not proven, there can be no conviction for the offense which

> constitutes the aggravating circumstance, and the proceeding falls to the ground. It is plainly indicated in *Motes* v. *United States* (178 U. S., 458; 20 Sup. Ct., 993; 44 L. ed., 1150) that this is the view taken of these sections by the Supreme Court. It can not be doubted that it was within the power of Congress to deal with such a conspiracy and *impose such punishment therefor as it should deem proper; and having such authority, it was competent to take notice of such incidents of violence and wrong as were likely to happen in the prosecution of such combinations, and to measure the punishment by that which is prescribed by the local law for such acts when made, of themselves, the subject of punishment. Though measured by those laws, the penalty is imposed by the law of the United States.*

In *Motes* v. *United States* (178 U. S., 462) it was said:

> And by section 5509 it is provided that if in committing the above offense any other felony or misdemeanor be committed the offender shall suffer such punishment as is attached to such felony or misdemeanor by the laws of the State in which the offense is committed.

It is clear that the defendants were not tried in the state court of Colorado for conspiracy to injure and oppress Joseph A. Walker and others in the exercise of the privilege described in the indictment. While such conspiracy would have been material evidence that the murder was committed with pre-

meditation, yet the existence of such a conspiracy was not wholly inconsistent with their innocence, as it might have been abandoned before the killing occurred. Therefore, if the above authorities cited were not conclusive, this case would not fall within the provisions of the Fifth Amendment, because the protection therein declared is against a second prosecution "*for the same offense.*"

Now, if Congress has the power to declare that the acts described in section 5508 shall constitute an offense against the United States, it also has the power to prescribe such punishment for that particular offense as it may deem proper. And, for the purpose of determining the extent of the punishment, it has also the power to authorize the courts to take cognizance of every circumstance connected with, or that may grow out of, the conspiracy. Some act may be committed in carrying out the conspiracy which will constitute a crime against the state, and of which as a separate offense the state courts alone have cognizance; yet this same act may still be looked to in the United States court as a mere incident to determine to what extent the offense against the United States has been aggravated. Of course, if the offending parties should be adequately punished by the state courts for such crime against the state, as a matter of justice to the defendants the United States court would, in all probability, as suggested by Chief Justice Taney in *United States* v. *Amy*, and by this court in *Fox* v. *Ohio, supra*, take such fact into consideration

and reduce the punishment accordingly. But this would be a matter entirely within the discretion of the court.

The constitutional prohibition does not undertake to regulate or limit the punishment that may be inflicted for any separate and distinct offense, but only prescribes that one can not be put twice in jeopardy *for the same offense*. As was said by this court in *United States* v. *Ball* (163 U. S., 669), in holding that one is put in jeopardy when tried, though acquitted, "The prohibition is not against being twice punished, but against being twice put in jeopardy."

**Point of defendants' contention.**

We apprehend that the distinction between the question here presented and that involved in many of the cases above cited, which is especially relied upon by defendants, is this:

In those cases there were *two offenses*, growing out of the same acts—one against the State, created by a state statute, and the other against the United States, created by an act of Congress; while the crime mentioned in section 5509, Revised Statutes, is a crime *against the State*, and, consequently, the jury must determine in this case whether or not the killing of Joseph A. Walker was murder *under the statutes of Colorado*, being the same offense for which defendants were tried and acquitted by the state court. But is this not a distinction without any material difference? Suppose section 5509 had pro-

vided: "If in the act of violating section 5508 the conspirators shall wilfully, deliberately, and premeditatedly kill another, they shall suffer death or imprisonment in the penitentiary for life." While not defining such acts as murder, yet they would in fact constitute murder in the first degree under the statutes of Colorado, and would require the same punishment as that provided for by said statutes. (3 Col. Anno. Stat., p. 341.) However, it can not be doubted that such a statute would draw into and make a part of the offense against the United States the acts described; and, under the numerous authorities above cited, a trial for murder in the state courts of Colorado would not be a bar to the consideration of the same facts under a proper indictment in the United States courts.

Can, then, the fact that the statute provides that, if in violating section 5508, "any other felony or misdemeanor be committed," instead of describing the acts that constitute the offense, bring the case within the Fifth Amendment? Precisely the same facts and the same elements which are required to constitute a crime must be considered by the jury, whether the language of the law describes the acts without defining the offense, or defines the offense without describing the acts. Clearly the purpose of Congress in enacting section 5509 was, and the effect of that section is, to draw into and make a part of, by aggravation of the offense described in section 5508, *the acts* of the conspirators that might constitute any offense under

the law of the State wherein the offense is committed. It was drawn in its present form only for the sake of brevity, as otherwise, to accomplish the same purpose, it would have required a description of the facts that constitute every offense that might be committed in carrying out a conspiracy of the character stated, and a designation of the punishment incident to each of such offenses.

Again, suppose the present case had been first tried, and the defendants had been found guilty of the conspiracy and acquitted of the murder, or acquitted of the entire charge, would it for a moment be supposed that such an acquittal would bar a prosecution by the State of Colorado for murder? It manifestly would not, for two reasons: First, because, as heretofore shown, the Fifth Amendment was not intended as a restriction upon the States, and a proceeding in a state court is not a jeopardy within its meaning; and, second, because the state court has exclusive jurisdiction over the offense of murder, and when the facts constituting such a crime are only collaterally or incidentally drawn in question in a federal court, such a proceeding can not be regarded as putting one in jeopardy for murder. The one reason rests upon the theory that the trial in the state court is not a jeopardy within the meaning of this amendment, and the other upon the theory that a trial upon this indictment in the United States court is not a jeopardy for murder within its meaning. Either theory is conclusive of this question, because to create the bar both

the former trial and the one in which such former trial is interposed by plea must constitute jeopardies.

For the foregoing reasons we insist that the action of the court below, in entertaining the special plea of former jeopardy, should be reversed, and said plea should be stricken out, and that a trial should be directed upon the indictment as drawn.

J. A. FOWLER,
*Assistant Attorney-General.*

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